Supreme Court, U.S.
FILED

95-378 SEP 8 - 1995

No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellants,

v.

BARNEY QUILTER, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

In this case, the majority of the three-judge federal district court, acting on remand from this Court, held that eight of Ohio's 99 state House Districts had been drawn in violation of the Equal Protection Clause of the Fourteenth Amendment. The questions presented on this appeal are: *

1. Did the court below violate the terms of this Court's remand, or commit an abuse of discretion, when, following the remand, it granted plaintiffs' motion for leave to file an amended complaint and proceeded to adjudicate the new claim presented in that complaint?

2. Was the district court divested of jurisdiction in this case once a proper notice of appeal was filed and perfected by the filing of a jurisdictional statement with this Court?

3. Did the district court err in allowing this action to be maintained with respect to those electoral districts in which no plaintiff suffered any cognizable injury?

4. Did the district court err by (a) ruling that a plaintiff may establish a *prima facie* case of racial gerrymandering without establishing that the state redistricting officials relied on race in substantial disregard of customary and traditional districting principles, and if not, (b) by ruling that, on the evidence before it, the defend-

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* Questions 1, 3, and 5, are identical to Questions 1, 2, and 4, respectively, in Appellants' Jurisdictional Statement in case number 95-132, filed on July 24, 1995. Because of the significant differences between the district court majority's decision of May 26, 1995, and its decision of August 11, 1995, Questions 3 and 5 from the Jurisdictional Statement in 95-132 are not applicable in this appeal from the district court's August 11, 1995, orders. Given the questionable validity of the district court's orders of August 11, 1995, see pp. 12-15, *infra*, Appellants do not, however, withdraw those Questions from the Court's consideration.

ants had given less weight to traditional districting principles than to racial considerations?

5. If the district court did not err in holding that plaintiffs had made out a *prima facie* case requiring strict scrutiny of defendants' actions, did the court err in concluding that the defendants had failed to establish a compelling interest justifying those actions?

LISTING OF ADDITIONAL PARTIES

Appellants

STANLEY J. ARONOFF, President of the Ohio Senate, ROBERT A. TAFT, II, Secretary of State of Ohio, and JAMES R. TILLING, Secretary to the Apportioning Persons.

Appellees

THOMAS E. FERGUSON, GLEN ACHTERMANN, SAM BARONE, SANDRA GUY, ROBERT McLAUGHLIN, JAMES B. McCARTHY, GLADYS HENSON, TOM KILBANE, ROBERT H. TRAINER, A. WAYNE BUSSLER, JAMES B. SPEROS, KENNETH THORNE, CHARLES WALKER, WILLIAM SHANKLIN, TYRONE RILEY, RICHARD CORDRAY, PAUL MECHLING, RONALD GERBERRY, Representative of the 65th Ohio House District, MARY ABEL, Representative of the 78th Ohio House District, and WILLIAM MALLORY.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The August 11, 1995, Order of the three-judge district court has not been officially reported. It is set out in the Appendix hereto at App. 1a.[1]

The August 11, 1995, Opinion of the three-judge district court majority has not been officially reported. It is set out in the Appendix hereto at App. 3a.

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[1] The following abbreviations are used throughout this Jurisdictional Statement:

App.	Appendix to this Jurisdictional Statement.
App. (95-132)	Appendix to the Jurisdictional Statement in *Voinovich v. Quilter*, No. 95-132 (filed on July 24, 1995).
D.	District court docket number.
Ex.	District court exhibit number.

The August 11, 1995, Supplemental Dissenting Opinion of Judge Dowd has not been officially reported. It is set out in the Appendix hereto at App. 46a.

The August 11, 1995, Judgment of the three-judge district court has not been officially reported. It is set out in the Appendix hereto at App. 53a.

The August 17, 1995, Memorandum and Order of a majority of the three-judge district court has not been officially reported. It is set out in the Appendix hereto at App. 55a.[2]

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[2] The following are the three-judge district court's orders which are the subject of the appeal currently pending before this Court, *Voinovich v. Quilter*, No. 95-132 (Jurisdictional Statement filed July 24, 1995):

The April 28, 1995, Opinion of the three-judge district court has not been officially reported. It is set out at App. (95-132) 1a.

The May 9, 1995, Order of the three-judge district court has not been officially reported. It is set out at App. (95-132) 81a.

The May 26, 1995, Opinion of the three-judge district court majority haa not been officially reported. It is set out at App. (95-132) 82a.

The March 31, 1994, Opinions and Orders of the three-judge district court have been officially reported at 857 F.Supp. 579 and 157 F.R.D. 36. They are set out at App. (95-132) 128a and 145a.

The May 26, 1995, Order Vacating Memorandum Opinion (Docket No. 322) and Vacating Order Regarding Admission of Trial Exhibits (Docket No. 320) of the three-judge district court majority has not been officially reported. It is set out at App. (95-132) 153a.

The June 23, 1995, Order of Chief Judge Merritt of the United States Court of Appeals for the Sixth Circuit has not been officially reported. It is set out at App. (95-132) 155a.

The following are the District Court's opinions and orders prior to this Court's decision in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993): (1) *Quilter v. Voinovich*, 794 F.Supp. 695 (N.D. Ohio Jan. 31, 1992); (2) *Quilter v. Voinovich*, 794 F.Supp. 756 (N.D. Ohio March 10, 1992); (3) *Quilter v. Voinovich*, 1992 WL 677145 (N.D. Ohio March 19, 1992); (4) *Quilter v. Voinovich*, 794 F.Supp. 760 (N.D. Ohio March 31, 1992); and (5) *Quilter v. Voinovich*, 794 F.Supp. 760 (N.D. Ohio May 5, 1992).

JURISDICTION

The Orders appealed from were filed on August 11, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1253. Appellants ask this Court to consider this Jurisdictional Statement together with the Jurisdictional Statement in *Voinovich v. Quilter*, No. 95-132, filed on July 24, 1995.

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

Pursuant to Supreme Court Rule 14.1(f), the text of the Fourteenth Amendment to the United States Constitution, 28 U.S.C. §§ 1253 & 2284, and Article XI of the Ohio Constitution is set out at App. 67a-78a.

STATEMENT OF THE CASE [3]

Pursuant to Article XI, § 1, of the Ohio Constitution, the Ohio Apportionment Board ("Board") convenes every ten years in the year following the decennial census. The 1991 Board [4] convened on August 22, 1991. D. 147, Ex. A at 1-2. The Board adopted a plan of apportionment for Ohio's General Assembly on October 1, 1991, D. 154, Ex. 16 at 31-32, and amended that plan on October 3, 1991. The plan was labeled "Amendment C." D. 154, Ex. 17 at 9-14.

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[3] This Statement of the Case relates primarily to the district court's issuance of its August 11, 1995, orders. A more complete Statement of the Case is included in the Jurisdictional Statement in *Voinovich v. Quilter*, No. 95-132 (filed July 24, 1995).

[4] The Board consisted of Defendants-Appellants George V. Voinovich, Governor of the State of Ohio, Robert A. Taft II, Secretary of State of Ohio, and Stanley J. Aronoff, President of the Ohio Senate, and Plaintiffs-Appellees Thomas E. Ferguson, Auditor of State of Ohio, and Barney Quilter, Speaker Pro Tempore of the Ohio House of Representatives. The Board elected Defendant-Appellant James R. Tilling, who was then the Chief Executive Officer of the Ohio Senate, as its Secretary. Appellees Ferguson and Quilter both left public office in 1995. They remain two of the twenty-one Plaintiffs who commenced this case.

On November 1, 1991, Plaintiffs-Appellees commenced this action in the district court alleging violations of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, the Fourteenth and Fifteenth Amendments to the United States Constitution, and Article XI of the Ohio Constitution. D. 1.[5] On January 31, 1992, the district court issued its Opinion and Order, declaring that Amendment C violated § 2 of the Voting Rights Act, because the Board had failed to justify the inclusion in the plan of several majority-minoriy districts. *Quilter v. Voinovich*, 794 F. Supp. 695 (N.D. Ohio 1992). The district court expressly abstained on the Ohio Constitutional issues, noting that these issues were then pending before the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992). 794 F. Supp. at 701-02. The district court remanded Amendment C to the Board with instructions to justify the majority-minority districts included in the plan. Judge Dowd dissented.

On February 14, 1992, the Ohio Supreme Court issued its decision upholding Amendment C against state constitutional attacks. *Voinovich v. Ferguson*, *supra*. After a majority of the members of the Ohio Supreme Court directed the Board to make technical corrections to the plan, 63 Ohio St. 3d at 202, 205, 214, those corrections were made, D. 147, Ex. C at 59; D. 147, Ex. A at 107,

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[5] Appellees have falsely asserted, in their Motion to Dismiss filed in case number 95-132, that they have, since the outset of this case, challenged Appellants' very consideration of race in the reapportionment process. Motion to Dismiss at 4. In reality, Appellees challenged not the consideration of race, but rather *how* race was considered. In the first appeal in this case, Appellees attempted to convince this Court that Appellants created majority-minority districts "wherever possible," when Appellants should have, in Appellees' view, considered race to create more influence districts. See *Voinovich v. Quilter*, 113 S.Ct. at 1153. Appellees argued to this Court that Appellants should have created districts of between 10% and 35% African-American voting age population because voters in such districts would elect either an African-American or a white Democrat sympathetic to minority concerns. Appellees' Brief (92-1618) at 3, 33-35.

and the plan, as amended, was labeled "Amendment D." D. 147, Ex. A. at 107.[6] Also, on February 18, 1992, the Board adopted "Findings and Conclusions," which, in the view of a majority of the Board, complied with the district court's order to "justify" the inclusion of majority-minority districts under both Amendment C and Amendment D. D. 147, Ex. A.

In opinions issued on March 10, 1992, and March 19, 1992, the district court majority ruled that the Board once again had failed to justify the inclusion of five majority-minority house districts and then ruled that Amendment D violated both § 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution. *Quilter v. Voinovich*, 794 F. Supp. 756 (N.D. Ohio 1992); *Quilter v. Voinovich*, 1992 WL 677145 (N.D. Ohio March 19, 1992). Judge Dowd again dissented.

Appellants appealed, and on March 2, 1993, this Court reversed the decision of the district court. *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993). The Court remanded the case to the district court "*only* for further proceedings on whether the plan's deviation from equal population among districts violates the Fourteenth Amendment." 113 S.Ct. at 1154 (emphasis added).

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[6] In its decisions, the district court referred to Amendment C as "the 1991 plan" and Amendment D as "the 1992 plan." For the most part, Amendment D's technical corrections involved reuniting split political subdivisions. D. 192; *Quilter v. Voinovich*, 794 F.Supp. 760, 763 (N.D. Ohio 1992). As explained by Tilling:

> That is only a result of recombining political subdivisions, and there's no other motivation whatsoever. But it points out, and I think you want to examine these numbers in real detail. It does illustrate what happens when you follow the Ohio Constitution, not the Voting Rights Act.

D. 147, Ex. B at 87. The plan originally proposed by the majority members of the Board contained nine majority-minority districts, while the plan adopted in October, 1991, *i.e.*, Amendment C, contained eight such districts. Amendment D reduced the number of majority-minority districts included in the plan to five.

On remand, the district court unanimously ruled "that the Ohio reapportionment plan survives scrutiny under the one-person-one-vote guarantee of the Equal Protection Clause . . . ." *Quilter v. Voinovich*, 857 F. Supp. 579, 587, App. (95-132) 143a (N.D. Ohio 1994). But by a two-to-one vote, the district court went further, exceeding the scope of this Court's remand by granting Appellees' motion to file a second amended complaint in order to attempt to state a claim under *Shaw v. Reno*, 113 S.Ct. 2816 (1993). *Quilter v. Voinovich*, 157 F.R.D. 36, App. (95-132) 145a (N.D. Ohio 1994). See Jurisdictional Statement (95-132) at 9-12.[7]

On April 28, 1995, the district court, again in a two-to-one decision, ruled that eight (8) of ninety-nine (99) Ohio House districts "violate the Equal Protection Clause of the Fourteenth Amendment." App. (95-132) 38a. The district court majority concluded that these eight districts, House Districts ("HD") 21, 22, 30, 31, 38,

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[7] Judge Dowd dissented from the order granting Appellees' motion to amend their complaint following this Court's remand, and in his dissenting opinion of April 28, 1995, expressed his conclusion that the amendment exceeded the scope of this Court's remand in *Voinovich v. Quilter, supra*. App. (95-132) 43a-44a, 59a. Judge Dowd, emphasizing the judge-shopping nature of the effort to amend, elaborated further in his Supplemental Dissenting Opinion issued on August 11, 1995:

> The majority asserts that, while it may not have authority to "consider on remand the issues that the Supreme Court decided," it may "consider issues that have not been decided." There is a world of difference between considering issues that have not previously been *decided* and issues that have not been previously *raised*. The entire point is that, once a case has gone on appeal and back, if the plaintiffs have *new* claims against the defendants, they must file a new lawsuit. Failure to do so stretches Fed.R.Civ.P. 15, the remand rule, and the local rules of this District Court so far beyond their meanings as to completely destroy them. This is the ultimate in judge-shopping, the very abuse sought to be avoided by this District Court's Local Rules.

App. 49a n.3 (Dowd, J., dissenting) (emphasis in original).

39, 44, and 49, had been racially gerrymandered because race was "a substantial and motivating factor" in their creation. App. (95-132) 34a. The district court ordered Defendants to redraw the eight districts. App. (95-132) 39a. Judge Dowd dissented. App. (95-132) 40a.

On May 26, 1995, the Appellants noticed their appeal from the district court's April 28, 1995, decision. App. (95-132) 157a. Just prior to the filing of the Notice of Appeal, however, two of the members of the three-judge district court panel issued an order purporting to vacate their April 28, 1995, decision, App. (95-132) 153a, and issued an amended decision with significant changes. App. (95-132) 82a. In the May 26, 1995, decision, the district court majority again found that race was "a substantial and motivating factor" in the creation of eight house districts. App. (95-132) 117a. In response to Judge Dowd's April 28, 1995, dissenting opinion, however, the majority abandoned its long-standing decision to abstain on state constitutional issues and found that the Board had violated Article XI, § 7(D) of the Ohio Constitution by not retaining more districts from the prior apportionment. App. (95-132) 124a-125a n.19.[8] On June 23, 1995, Appellants noticed their appeal from the district court majority's purported decision of May 26, 1995. App. (95-132) 159a.

Appellants filed their Jurisdictional Statement in *Voinovich v. Quilter*, No. 95-132, on July 24, 1995. Because

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[8] Judge Celebrezze, who began serving as a member of the three-judge panel following this Court's remand in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993), submitted his "resignation as a Senior Judge of the Sixth Circuit Court of Appeals" effective May 1, 1995. D. 333, Exs. F & G. Accordingly, Appellants moved to vacate the district court majority's May 26, 1995, decision on the basis that Judge Celebrezze was not authorized to perform any judicial acts following his resignation. Alternatively, Appellants argued that the district court majority should have adhered to its earlier decision to abstain on state constitutional issues. See Jurisdictional Statement (95-132) at 6-7 n.7.

Appellants have grave concerns regarding the validity of the district court's May 26, 1995, orders, see n.8, *supra*, that Jurisdictional Statement addressed both the April 28, 1995, and the May 26, 1995, decisions.

On August 11, 1995, despite the district court's jurisdiction over this case having been divested by Appellants' filing of a notice of appeal to this Court and of a Jurisdictional Statement, the district court vacated its May 26, 1995, decision, and issued a new opinion "to incorporate in [its] Opinion relevant analysis from [this] Court's *Miller* decision." App. 2a.[9] See *Miller v. Johnson*, 115 S.Ct. 2475 (1995).

In its April 28, 1995, and May 26, 1995, decisions, the district court majority expressly rejected the "predominant motivating factor" standard advanced by Appellants in their Post Trial Brief, see D. 313 at 55-56, and eventually adopted by this Court in *Miller*. App. (95-132) 15a-16a; App. (95-132) 97a-98a. In its August 11, 1995, Opinion, however, the district court ruled that race *was* the "predominant" factor motivating the adoption of Amendment D. The district court majority so ruled even though it did not find that Appellants had disregarded any traditional districting principle. Indeed, the majority, in view of its interpretation of *Miller*, readily assumed that Amendment D complied with all traditional districting principles:

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[9] Interestingly, the district court did not incorporate in its opinion the relevant analysis from this Court's decision in *United States v. Hays*, 115 S.Ct. 2431 (1995). As explained in Appellants' Jurisdictional Statement in Case Number 95-132, under this Court's decision in *Hays*, Appellees lack standing to challenge four of the eight districts declared invalid by the district court majority.

The district court majority also "re-abstained" on state constitutional issues, and ruled that Judge Merritt had mooted the issue regarding Judge Celebrezze's continued participation in this case by appointing him *nunc pro tunc*, effective May 1, 1995. The district court did not, however, address Appellants' argument that, because Judge Celebrezze "resigned" rather than "retired," he was not authorized to perform *any* judicial acts after his resignation.

> [T]he conclusion that 'subordination" can only be proven if a state abandons or violates traditional districting principles in favor of racial considerations constitutes a logical fallacy. The presupposition of such a conclusion is that if districts are drawn on the basis of traditional districting principles—compactness, contiguity, etc., then such districts cannot be the result of racial gerrymandering. Such a conclusion is fallacious because it is certainly possible, both logically and factually, that districts could be crafted within the confines of traditional districting principles and still be predominantly motivated by racial considerations at the same time. Furthermore, to conclude otherwise accords a preclusive constitutional significance to a state's compliance with traditional districting principles, which exceeds the significance accorded by the Court.
>
> Taken together, all of this language leads us to conclude that a plaintiff may satisfy the predominant factor test and prove that traditional districting principles were subordinated to racial objectives not only when a state violates or abandons traditional districting principles in favor of racial motivations but also when a state substantially complies [*sic*] traditional districting principles and gives them less weight in the apportionment process than racial considerations.

App. 19a-20a (citation omitted).

> At this point we note that for purposes of this case, we assume without holding that the Apportionment Board substantially complied with the traditional districting principles mandated in Article XI of the Ohio Constitution. Based on our earlier analysis of the *Miller* Court's predominant factor test, we find it unnecessary to specifically address whether the Defendants complied with the traditional districting principles contained in the Ohio Constitution because even if a state substantially adheres to traditional districting principles, a plaintiff can still prove that racial objectives were the predominant factor in the

> apportionment proces if traditional districting principles were subordinated to—given less weight than —racial considerations.

App. 35a-36a (citations omitted). The majority entered judgment in favor of Appellees. App. 53a. Judge Dowd again dissented. App. 46a.

On August 17, 1995, the district court majority denied Appellants' request for a stay of its May 26, 1995, order, and indicated in a footnote that it would deny a stay, if requested, of its August 11, 1995, orders. App. 56a n.1.[10]

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. INTRODUCTION.

What is clear from the district court majority's actions of August 11, 1995, is that it is searching for a reason, *any reason*, to usurp the authority of the Ohio Apportionment Board to draw districts for the Ohio General Assembly. In its efforts to invalidate the reapportionment plan adopted by the Board, the district court majority exceeded its jurisdiction and misapplied this Court's decision in *Miller*.

In addition to the issues presented in the Jurisdictional Statement in case number 95-132,[11] this case involves

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[10] Appellants did indeed file a motion for a stay just *prior* to the issuance of the district court majority's August 17, 1995, Memorandum and Order. D. 353. Because the district court majority made no reference to the arguments contained in Appellants' August 17, 1995, stay request, it is obvious that it did not review that motion prior to the issuance of its August 17, 1995, Memorandum and Order.

[11] Appellants hereby incorporate by reference certain arguments contained in their July 24, 1995, Jurisdictional Statement in *Voinovich v. Quilter*, No. 95-132. Specifically, Appellants continue to assert (1) that the district court exceeded the scope of this Court's remand and otherwise abused its discretion by permitting Appellees to amend their complaint following remand, see Jurisdictional Statement (95-132) at 9-12, (2) that the Appellees lack

several substantial questions concerning the jurisdiction of a three-judge district court to act on the merits of a case following the filing and perfection of a notice of appeal to this Court. In the case at bar, the Appellants filed their notice of appeal from the district court's May 26, 1995, decision on June 23, 1995, and perfected that appeal by filing their Jurisdictional Statement with this Court on July 24, 1995. Nevertheless, on August 11, 1995, the majority of the three-judge district court in this case vacated its May 26, 1995, decision and issued another decision altering the basis on which it invalidated eight Ohio House of Representatives districts. Appellants maintain that the district court was without jurisdiction to issue its orders of August 11, 1995.

Assuming that the district court was not divested of jurisdiction, its declaration that eight Ohio House of Representatives districts had been drawn in violation of the Equal Protection Clause of the Fourteenth Amendment constituted an erroneous application of this Court's decision in *Miller v. Johnson*, 115 S.Ct. 2475 (1995). The district court majority ruled that, although Appellees had not established the violation of any traditional districting principle, Appellants had, nevertheless, "subordinated" those principles to race by giving them less weight than racial considerations. This conclusion is neither legally nor factually defensible.

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standing to challenge the validity of four of the eight districts declared invalid by the district court, see Jurisdictional Statement (95-132) at 13-14, (3) that the record does not permit a finding that race was "the predominant motivating factor" in drafting the districts contained in Amendment D, see Jurisdictional Statement (95-132) at 16-21, and (4) that even if strict scrutiny were properly invoked, the district court erred by concluding that Appellants did not have a compelling state interest for its consideration of race in conjunction with traditional districting principles, see Jurisdictional Statement (95-132) at 21-23.

II. THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ENTER THE ORDERS OF AUGUST 11, 1995

It is a fundamental tenet of federal jurisdiction that the "filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal." *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985) (citation omitted).

> [A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.

Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) (citations omitted). See also *Lewis v. Alexander*, 987 F.2d 392, 394 (6th Cir. 1993).[12]

In this case, this Court's jurisdiction was invoked when the Appellants filed their notice of appeal from the district court's May 26, 1995, opinion. See *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 308 n.11 (1975) (An opinion which "directs" the parties to perform certain acts is an injunction punishable by contempt, and under 28 U.S.C. § 1253, the Supreme Court has jurisdiction over an appeal therefrom.).[13]

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[12] Similarly, it is well-established that a notice of appeal under former 28 U.S.C. § 1254(2), which permitted *appeals* to this Court (as contrasted with petitions for certiorari) from federal courts of appeals in certain cases, divested the court of appeals of jurisdiction over the case. *Donovan v. Richland County Ass'n for Retarded Citizens*, 454 U.S. 389, 390 n.2 (1982) ("The filing of the notice of appeal [to the Supreme Court] clearly divested the Court of Appeals of any jurisdiction that it otherwise had to decide the merits of the case.").

[13] Because the Appellants' appeal is a direct appeal as of right from the decision of the district court, rather than a discretionary

Furthermore, the fact that a *final* judgment had not been entered when Appellants filed their first two notices of appeal does not alter this rule. In cases dealing with interlocutory appeals to the courts of appeals from district court orders granting or denying an injunction, see 28 U.S.C. § 1292(a), it is well established that:

> *The filing of a timely and sufficient notice of appeal immediately transfers jurisdiction of all matters relating to the appeal from the district court to the court of appeals. It divests the district court of authority to proceed further with respect to such matters*, except in aid of the appeal, or to correct clerical mistakes under Rule 60(a) of the Federal Rules of Civil Procedure or Rule 36 of the Federal Rules of Criminal Procedure, or in aid of execution of judgment that has not been superseded, *until the district court receives the mandate of the court of appeals.*
>
> *Thus, after a notice of appeal is timely filed, the district court has no power to* grant the appellant's motion to dismiss the action without prejudice, to allow the filing of amended or supplemental pleadings, to grant summary judgment, to act on an application for intervention, or *otherwise reexamine the order from which an appeal is pending.*

9 MOORE'S FEDERAL PRACTICE ¶ 203.11 (emphasis added) (footnotes omitted). See also *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 3 F.3d 877, 883 (5th Cir. 1993); *Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 819 (5th Cir. 1989); *Taylor v. Sterrett*, 640 F.2d 663, 667-68 (5th Cir. 1981).

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appeal, this Court's jurisdiction is invoked, and the district court's jurisdiction divested, immediately upon the filing of the notice of appeal. See 12 MOORE'S FEDERAL PRACTICE ¶ 400.05[2] ("The term 'appeal' is also used to denote the right of a litigant to invoke the obligatory jurisdiction of the Court. Thus if the right of appeal is given within a valid statutory grant and the appeal is taken in compliance with the practice governing appeals, then the Court's obligatory jurisdiction over the case has been invoked and it must hear the issues properly presented.") (footnotes omitted).

The Second Circuit has addressed a factually analogous situation. In *New York v. Nuclear Regulatory Comm'n*, 550 F.2d 745 (2d Cir. 1977), the plaintiff moved the district court for a preliminary injunction, the court denied the motion, and the plaintiff appealed. While the appeal was pending, the plaintiff again moved the district court for an injunction, and the district court ruled that it was without jurisdiction to consider the second motion. The Court of Appeals affirmed:

> Thus construing the later motion to be one seeking to reargue the earlier motion on the basis of the new affidavits, the district court believed that Rule 62(c) of the Federal Rules of Civil Procedure controlled the situation and that under our decision in *Ideal Toy Corp. v. Sayco Doll Corp.*, 302 F.2d 623 (2d Cir. 1962), the district court lacked jurisdiction to tamper in any way with the order then on interlocutory appeal other than to issue orders designed to preserve the status of the case as it sat before the court of appeals. We agree.

New York, 550 F.2d at 758-59.

The Fifth Circuit has reached a similar conclusion. In *Dayton Indep. School Dist. v. U.S. Mineral Prods. Co.*, 906 F.2d 1059, 1063 (5th Cir. 1990), the district court granted the plaintiff's motion to amend its complaint while an interlocutory appeal was pending from the district court's order refusing to dismiss the complaint. The Court of Appeals, however, ruled that the district court lacked jurisdiction to grant the motion to amend because "[w]hen one aspect of a case is before the appellate court on interlocutory review, the district court is divested of jurisdiction over that aspect of the case. A district court does not have the power to 'alter the status of the case as it rests before the Court of Appeals.'" *Dayton Indep. School Dist.*, 906 F.2d at 1063 (citations omitted). See also *Asher v. Harrington*, 461 F.2d 890, 895 (7th Cir. 1972).

In the case at bar, Appellants filed their notices of appeal in the district court, App. (95-132) 157a, 159a, on May 26 and June 23, 1995, respectively. They filed their Jurisdictional Statement with this Court on July 24, 1995. *Voinovich v. Quilter*, No. 95-132 (appeal pending). Furthermore, on July 27, 1995, they forwarded to the Clerk of this Court an Application to Stay. Both of the documents filed with this Court were, of course, based on the decisions of the district court issued on April 28 and May 26, 1995.

Now the district court majority has substantially altered the status of this case on appeal. It has now purported to vacate both of its prior decisions in this case, and has once again changed the legal standard under which the Ohio plan of apportionment is to be analyzed. Contrary to the Second Circuit's admonition in *New York v. Nuclear Regulatory Comm'n, supra*, the district court majority, if the August 11, 1995, orders are considered valid, has destroyed the posture of the case pending before this Court.

The district court was divested of jurisdiction when Appellants filed their June 23, 1995, notice of appeal herein, App. (95-132) 159a, and perfected that appeal by filing their Jurisdictional Statement with this Court on July 24, 1995. Accordingly, the orders issued on August 11, 1995, are invalid. Because the law in this regard is clear, this Court should note probable jurisdiction and vacate the district court's orders of August 11, 1995.

III. THE DISTRICT COURT ERRED BY MISAPPLYING THIS COURT'S DECISION IN *MILLER v. JOHNSON*.

This Court in *Miller v. Johnson, supra*, stated that the good faith of the state in redistricting must be presumed in the absence of a sufficient showing to the contrary:

> The courts, in assesing the sufficiency of a challenge to a districting plan, must be sensitive to the complex

> interplay of forces that enter a legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race *predominates* in the redistricting process. * * * The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that *race was the predominant factor motivating the legislature's decision* to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature *subordinated traditional race-neutral districting principles*, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can "defeat a claim that a district has been gerrymandered on racial lines."

Miller, 115 S.Ct. at 2488 (citations omitted) (emphasis added).[14]

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[14] In her concurring opinion, Justice O'Connor stated:

> I understand the threshold standard the Court adopts—"that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations,"—to be a demanding one. To invoke strict scrutiny, a plaintiff must show that the State has relied on race *in substantial disregard of customary and traditional districting practices*. Those practices provide a crucial frame of reference and therefore constitute a significant governing principle in cases of this kind. * * *
>
> Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles. That is so even though race may well have been considered in the redistricting process.

Miller, 115 S. Ct. at 2497 (O'Connor, J., concurring) (emphasis added) (citations omitted).

The district court majority, without the benefit of additional briefing or argument, issued a new decision in which it disregarded this unambiguous language in *Miller* and concluded that eight districts in Amendment D are invalid even under the "predominant motivating factor" test. In so holding, the district court majority concluded that "a plaintiff may satisfy the predominant factor test and prove that traditional districting principles were subordinated to racial objectives not only when a state violates or abandons traditional districting principles in favor of racial motivations but also when a state substantially complies [*sic*] traditional districting principles and gives them less weight in the apportionment process than racial considerations." App. 19a-20a.

The district court majority twice previously rejected the "predominant motivating factor" standard, App. (95-132) 15a-16a, 97a-98a, the very standard we urged the district court to adopt in determining whether the Ohio plan of apportionment is subject to strict scrutiny. See D. 313 at 55-56. In rejecting the "predominant motivating factor" test, the district court implied that the plan would not be subject to strict scrutiny under that test because race was simply one of many facors considered in drawing the plan. Indeed, the district court majority acknowledged that race was simply one factor considered in drawing a plan:

> The Defendants admittedly considered race when drafting their 1992 apportionment plan. The Apportionment Board instructed Tilling to "draw a plan that was in comportment with the Ohio Constitution, the Fourteenth and Fifteenth Amendments of the United States Constitution and the Voting Rights Act," and Tilling attempted to comply. Tilling considered race to avoid dilution of minority voting strength in violation of the Voting Rights Act.

App. (95-132) 28a (citations omitted). See also App. (95-132) 111a (same).[15]

The district court majority did not find that Appellants "relied on race in substantial disregard of customary and traditional districting principles." *Miller*, 115 S.Ct. at 2497 (O'Connor, J., concurring). See App. 35a-36a. Indeed, the district court majority found that no districts were bizarre in shape and assumed that Appellants had complied with all traditional districting principles. See App. 35a-37a. Thus, Plaintiffs did not and cannot prove that traditional districting principles were "subordinated," but only that race was simply one of many factors considered.

Moreover, the district court majority's August 11, 1995, Opinion cannot be reconciled with this Court's June 29, 1995, affirmance of the Eastern District of California's decision in *DeWitt v. Wilson*, 856 F.Supp. 1409 (E.D. Cal. 1994), *aff'd in part, dismissed in part*, 115 S.Ct. 2637 (1995). In that case, the district court stated:

> Thus, in redistricting, consciousness of race does not give rise to a claim of racial gerrymandering when race is considered along with traditional redistricting principles, such as compactness, contiguity, and political boundaries.
>
> * * * *
>
> The Masters did not draw district lines based deliberately and solely on race, with arbitrary distortions of district boundaries. The Masters, in formulating the redistricting plan, properly looked at race, not as the sole criteria in drawing lines but as one of the many factors to be considered. We agree with the California Supreme Court that the Masters' Report evidences a judicious and proper balancing of the many factors appropriate to redistricting, one of

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[15] Interestingly, the district court majority made the same finding in its Opinion of August 11, 1995. App. 29a.

> which was the consideration of the application of the Voting Rights Act's objective of assuring that minority voters are not denied the chance to effectively influence the political process.
>
> * * * *
>
> We conclude that the Masters' redistricting plan, as approved by the California Supreme Court, is not racial gerrymandering, but rather a thoughtful and fair example of applying traditional redistricting principles, while being conscious of race. Thus, we find that the plaintiffs have failed to state a claim of racial gerrymandering. We conclude that in the context of redistricting, where race is considered only in applying traditional districting principles along with the requirements of the Voting Rights Act, that strict scrutiny is not required.

DeWitt, 856 F.Supp. at 1413-15.

Like the Masters in California, the Appellants herein considered race as *a* factor, in an effort to comply with the Voting Rights Act, and the district court so acknowledged. Appellants did not *subordinate* any traditional districting principle to racial considerations. Indeed, the Ohio Supreme Court concluded that "the plan," with the exception of numerous technical errors identified by both Appellants and Appellees, complied with the Ohio Constitution. *Voinovich v. Ferguson*, 63 Ohio St.3d at 200. As both this Court and the district court noted, Appellants corrected the technical errors and the corrections became Amendment D, see *Voinovich*, 113 S.Ct. at 1154; App. 6a, the only plan of apportionment drafted by Appellants that has ever been used for an election. Since the adoption of Amendment D, no court has ever found that any district in Amendment D violated any provision of the Ohio Constitution, or any traditional districting principle.[16] Accordingly, the district court, by mis-

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[16] Prior to its "re-abstention," the district court majority had concluded that Appellants violated Article XI, § 7(D) of the Ohio

interpreting this Court's decision in *Miller*, erred in holding that Appellants violated the Fourteenth Amendment.

IV. EVEN IF THE DISTRICT COURT CORRECTLY INTERPRETED THIS COURT'S DECISION IN *MILLER v. JOHNSON*, ITS CONCLUSION THAT APPELLANTS GAVE LESS WEIGHT TO TRADITIONAL DISTRICTING PRINCIPLES THAN TO RACIAL CONSIDERATIONS IS CLEARLY ERRONEOUS.

Even if the district court majority had jurisdiction to consider Amendment D under this Court's decision in *Miller* and to issue its orders of August 11, 1995, without additional briefing or argument, and even if the court correctly concluded that a plaintiff may establish a Fourteenth Amendment violation in the absence of the violation of traditional districting principles, the district court majority erred by finding that race was "the predominant motivating factor" in the creation of eight Ohio house districts. Rather, what is readily apparent from the evidence adduced during four years of this litigation is that Appellants steered a careful and steady course in drawing districts for the Ohio General Assembly. They did so for the sole purpose of attempting to comply with *all* applicable state and federal laws. See *DeWitt*, 856 F. Supp. at 1415.

In support of its finding, the district court cites to only two items as evidence of racial gerrymandering: (1) Tilling's handwritten notes recorded at the time he made his first draft of an apportionment plan, and (2) the Board's Findings and Conclusions adopted following the district court's January 31, 1992, decision ordering the

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Constitution by not retaining more districts from the prior apportionment. App. (95-132) 124a-125a, n.19. As explained in Appellants' Jurisdictional Statement in Case Number 95-132, however, this conclusion is simply not legally defensible. See Jurisdictional Statement (95-132) at 17-18, 28.

Board to "justify" Amendment C. Neither of these items supports the district court's conclusion.

As to Tilling's notes, he testified at trial that the plan described in those notes was not the plan of apportionment now in effect for Ohio's General Assembly. D. 312 at 335. That plan was never adopted by the Board and was never in effect for any election. As established by the transcripts of the Apportionment Board meetings, the "model" plan first submitted by Tilling on September 26, 1991, was modified on numerous occasions.[17] Amendment D is the only plan that has ever been effective for an election in Ohio. Thus, the handwritten notes are irrelevant.

To the extent Tilling's notes have any relevance, they establish that race was *not* "the predominant motivating factor" in drawing the districts contained *in Amendment D*. As Tilling explained at trial, he created his "model" plan to determine how many majority-minority districts could be created so that he could use that plan as a benchmark to judge all plans submitted to the Board. D. 312 at 335. Under his "model" plan, Tilling created nine majority-minority districts, but Amendment D contains only five such districts. Furthermore, when Amendment D was adopted reducing the number of majority-minority districts to five, Tilling explained that the sole (and uncontradicted) reason for doing so was to comply with the provisions of Article XI of the Ohio Constitution. D. 147, Ex. B at 87, which, contrary to the district court majority's holding, establishes that the requirements

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[17] The plan described in Tilling's notes was modified: (1) at the September 30, 1991, Board meeting, D. 154, Ex. 15 at 107-18, (2) at the October 1, 1991, Board meeting (to incorporate the districts in Cuyahoga County agreed to by the Black Elected Democrats of Ohio, the Black Elected Democrats of Cleveland, Ohio, and the NAACP), D. 154, Ex. 16 at 29-32, (3) at the October 3, 1991, Board meeting when Amendment C was adopted, D. 154, Ex. 17 at 9-15, and (4) at the February 18, 1992, Board meeting, when Amendment D was adopted. D. 147, Ex. C.

of the Ohio Constitution were "given more weight than" race in drafting Amendment D. Thus, even under the district court majority's strained interpretation of this Court's decision in *Miller*, race was not "the predominant motivating factor" in the drafting of Amendment D.

As to the Board's Findings and Conclusions adopted on February 18, 1992, D. 147, Ex. A, they were adopted by the Board only after it was ordered by the district court on January 31, 1992, to "justify" its inclusion of majority-minority districts in Amendment C. *Quilter v. Voinovich*, 794 F. Supp. at 701-02. Accordingly, those findings and conclusions merely constitute a *post hoc* rationalization for the plan eventually adopted. They do not support a finding that traditional districting principles were subordinated to the Board's consideration of race. Rather, when considered as a whole, they establish the Board's belief that its plan complied with *both* the traditional districting principles embodied in Article XI of the Ohio Constitution and the requirements of federal law. See *Voinovich*, 113 S.Ct. at 1158. Thus, it is plain that race was *not* the predominant factor in the Board's reapportionment.[18]

Amendment D stands in stark contrast to the Eleventh Georgia Congressional District invalidated by this Court in *Miller*. Unlike the 11th District in *Miller*, each of the eight districts declared invalid by the district court herein is wholly located within a county. In fact, no district with a significant black population crosses a county boundary.

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[18] The district court majority also cites as evidence of racial gerrymandering the following increases in black voting age population in districts then represented by incumbent African-American legislators: (1) HD 21, +7.50%; (2) HD 22, +6.18%; (3) HD 30, +2.78%; (4) HD 31, +3.26%; (5) HD 38, +2.30%; (6) HD 39, +4.59%; (7) HD 44, +7.67%; and (8) HD 49, +8.29%. App. 31a-35a. Appellants maintain that these minor increases in African-American voting age population do not support a finding that race was "the predominant motivating factor" in drawing the districts contained in Amendment D.

Moreover, every Ohio house district fully complies with the provisions of Article XI of the Ohio Constitution. They are compact and contiguous, see Article XI, § 7(A), App. 73a; they are created using the boundaries of political subdivisions and wards, see Article XI, § 6, App. 73a; they comply with the population requirements of the Ohio and United States Constitutions, see Article XI, §§ 3 & 4, App. 72a; and not more than one political subdivision is divided between two districts, see Article XI, § 7(C), App. 74a. See *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992); *Quilter v. Voinovich*, 857 F. Supp. 579 (N.D.Ohio 1994). The district court made no finding to the contrary, and indeed found that none of the districts is bizarre in shape. App. (95-132) 34a, 117a; App. 36a-37a. Furthermore, the district court found that "[t]he Apportionment Board instructed Tilling to 'draw a plan that was in comportment with the Ohio Constitution, the Fourteenth and Fifteenth Amendments of the United States Constitution and the Voting Rights Act,' and Tilling attempted to comply. Tilling considered race to avoid dilution of minority voting strength in violation of the Voting Rights Act." App. (95-132) 28a (citations omitted); App. (95-132) 111a (citations omitted); App. 29a.

Finally, it must be stressed that unlike the Georgia General Assembly, the Ohio Apportionment Board did not seek to create majority-minority districts "wherever possible." Indeed, as demonstrated by the plan described in Tilling's handwritten notes, it was possible to create nine majority-minority house districts. Yet Amendment D, the only plan ever in effect for an election in Ohio, contained only five majority-minority districts. And only *one* of the eight districts declared invalid by the district court majority herein is a majority-minority district.

From the foregoing it is clear that race was not the predominant motivating factor used by the Board in drafting Amendment D. Thus, not only did the majority of the court below apply an erroneous interpretation of this

Court's decision in *Miller*, it incorrectly concluded that race "was given more weight than" traditional districting principles. Accordingly, this Court should note probable jurisdiction and reverse the decision of the district court.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Appellants' Jurisdictional Statement filed on July 24, 1995, in case number 95-132, this Court should either:

(a) summarily reverse the judgment below and remand for entry of judgment in Appellants' favor in accordance with the court's opinion and mandate in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993); or

(b) note probable jurisdiction and reverse the decision of the district court.

Respectfully submitted,

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Dated: September 8, 1995

APPENDICES

APPENDIX A

[Filed Aug. 11, 1995]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5: 91CV-2219

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

Judge Nathaniel R. Jones
Judge Anthony J. Celebrezze, Sr.
Judge David D. Dowd, Jr.

ORDER

On June 16, 1995, Defendants filed a Motion to Vacate (Docket No. 333) our Opinion (Docket No. 327) and two previous Orders (Docket Nos. 325, 326) in the instant case. Plaintiffs filed a Memorandum in Opposition to Defendants' Motion to Vacate (Docket No. 338) on July 3, 1995.

First, Defendants argued that the Opinion and Orders should be vacated as invalid because Judge Celebrezze was not properly appointed to serve as a judge in this case, but Chief Judge Merritt's Order (Docket No. 334), filed June 23, 1995, rendered this argument moot.

Alternatively, Defendants moved this court to vacate its Opinion and to reissue the Opinion without footnote

19 because Defendants contended that abstention regarding Ohio Constitutional issues was required in this case. While this court was considering the Defendants' latter argument, the Supreme Court rendered its decision in *Miller v. Johnson*, Nos. 631/797/929, 1995 WL 382020 (U.S. June 29, 1995), which contained analysis relevant to the issue in this case. After reviewing the Court's *Miller* decision, we have concluded that it was not necessary for us to specifically address whether the Defendants complied with the traditional districting principles contained in the Ohio Constitution. Therefore, we have decided to partially grant the Defendants' Motion to Vacate by amending footnote 19 (footnote 17 in the new Opinion). Furthermore, we have decided to incorporate in our Opinion relevant analysis from the Court's *Miller* decision.

Our previous Opinion (Docket No. 327) in this case, filed May 26, 1995, is hereby VACATED, and the new Opinion, attached to this Order, is to be filed.

IT IS SO ORDERED.

/s/ Nathaniel R. Jones
NATHANIEL R. JONES
U.S. Circuit Judge

/s/ Anthony J. Celebrezze, Sr.
ANTHONY J. CELEBREZZE, SR.
U.S. Circuit Judge

APPENDIX B

[Filed Aug. 11, 1995]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 5: 91CV-2219

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

Judge Nathaniel R. Jones
Judge Anthony J. Celebrezze, Sr.
Judge David D. Dowd, Jr.

OPINION

The question before this court is whether the Ohio Apportionment Board's consideration of race in its 1992 redistricting plan violated the Equal Protection Clause of the Fourteenth Amendment. We hold that by virtue of demonstrated white and African American coalitional voting for legislative seats in Ohio, and the failure of Defendants to demonstrate a compelling state interest for using race as the predominant factor in drawing legislative lines, certain districts in the 1992 plan are unconstitutional.

I. Background and Procedural History

Pursuant to the Ohio Constitution, the State Apportionment Board, comprised of five members, must reapportion State House and Senate electoral districts for the state legislature every ten years.[1] Following the 1990 federal census, a majority of the Apportionment Board[2] appointed James R. Tilling to draft an apportionment plan on behalf of the Board. After conducting public hearings throughout the state, including meeting with some members of minority organizations, Tilling drafted a plan that included eight majority-minority districts, districts in which a majority of the population is a member of a specific minority group. *Voinovich v. Quilter*, 113 S. Ct. 1149, 1153 (1993). On October 1, 1991, the Apportionment Board adopted the plan Tilling submitted by a 3-2 vote along party lines. *Id.* The three Republican members voted for the plan, and the two Democrats voted

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[1] Article XI, Section 1 of the Constitution of the State of Ohio provides:

> The governor, auditor of state, secretary of state, one person chosen by the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the general assembly.
>
> Such persons, or a majority of their number, shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine house of representatives districts and thirty-three senate districts. Such meeting shall convene on a date designated by the governor between August 1 and October 1 in the year [1971] and every tenth year thereafter.

Ohio Const., art. XI, § 1.

[2] The majority consisted of Defendants George V. Voinovich, Governor of the State of Ohio, Stanley J. Aronoff, President of the Ohio Senate, and Robert A. Taft, II, Secretary of State of Ohio. In the minority were Plaintiffs Barney Quilter, Speaker Pro Tempore of the Ohio House of Representatives, and Thomas E. Ferguson, Auditor of the State of Ohio.

against it. The Board later reconvened on October 3, 1991, to make several technical amendments to the plan, and the plan, adopted on October 3, 1991, in the wake of these changes, was designated "Amendment C."

On November 1, 1991, Barney Quilter and Thomas Ferguson, the two Democrats on the Board who voted against the plan, and various Democratic party officials and legislators filed suit against the Republican members of the Apportionment Board and Tilling.[3] Seeking invalidation of the plan, the Plaintiffs alleged that the redistricting plan violated section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, the Fourteenth and Fifteenth Amendments to the United States Constitution, and Article XI of the Ohio Constitution, which provided specific apportionment guidelines. *Voinovich v. Quilter*, 794 F. Supp. 695, 695-96 (N.D. Ohio 1992). According to the Plaintiffs, the Defendants intentionally "packed minorities into certain districts where minorities historically were able to elect representatives of choice with crossover votes." *Id.* at 698. The Plaintiffs contended that this packing resulted in a waste of minority votes in the packed districts and a dilution of minority voting strength in the surrounding areas where the "packed" voters could influence elections. *Id.* In response, the Defendants contended that the plan actually enhanced the strength of black voters by creating safe, minority-dominated districts. As justification for these changes, the Defendants cited compliance with the Voting

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[3] The dissent claims that the Plaintiffs commenced this litigation "to wrest control of Ohio's reapportionment process from the majority of the Board and place it with the federal court system." Dissenting Op. at [2]. Obviously, such a charge could be leveled against any entity that chooses to challenge a state's infringement of its federal statutory or constitutional rights because it is one of the means to bring such a challenge. Nevertheless, this was not the end or purpose for which the Plaintiffs filed their claim. The Plaintiffs sought a reapportionment plan that was not racially discriminatory, and in filing suit with the federal court, they were simply utilizing the best means to accomplish that end.

Rights Act and federal case law, which allegedly mandated the drawing of majority-minority districts. *Id.*

On January 31, 1992, a majority of this three judge panel held that there was "no legal mandate or finding of a Voting Rights Act violation to justify Defendants' creation of majority-minority districts wherever possible in the 1991 apportionment plan." *Id.* at 701. Thus, we ordered the Board to draft a new plan or demonstrate that it was remedying a section 2 violation.[4] *Id.* at 702.

The Apportionment Board responded by establishing and adopting a record on February 18, 1992, that, in its view, justified the Board's creation of minority-controlled state legislative districts. Furthermore at its February 18 meeting, the Board amended the 1991 plan to eliminate a series of technical errors in the plan that the Ohio Supreme Court had identified in its separate review of the plan, *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992). The resulting 1992 plan, "Amendment D," created only five majority-minority districts, however, a reduction from the eight majority-minority districts in the 1991 plan, "Amendment C."

On March 10, 1992, after the Board submitted its findings and conclusions, along with the new 1992 plan, this court held that the Board "fail[ed] once again to justify its wholesale creation of majority-minority districts, thus rendering the plan, as submitted, violative of the Voting Rights Act of 1965." *Quilter v. Voinovich*, 794 F. Supp. 756, 757 (N.D. Ohio 1992). Furthermore, this court held that the 1992 plan also violated the Fifteenth Amendment of the United States Constitution. *Id.*

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[4] We declined to address the Plaintiffs' constitutional claims at this point because our analysis under the Voting Rights Act required the plan to be justified or revised. Likewise, because the Ohio Supreme Court, in *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992) (per curiam), was concurrently considering the Plaintiffs' claim under the Ohio Constitution, we abstained from addressing the pendant claim.

Nine days later, in response to Defendants' motion for a stay of the March 10 order pending appeal to the United States Supreme Court, this court additionally held that both the 1991 and 1992 plans violated the Fourteenth Amendment because they departed from the requirement that all districts be of nearly equal population. *Quilter v. Voinovich*, No. 5:91CV-2219, 1992 WL 677145, at *10 (N.D. Ohio Mar. 19, 1992).

The Defendants appealed to the United States Supreme Court. In *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993), the Supreme Court reversed this court's *Quilter* decisions. Denying two of the Plaintiffs' claims, the Court held that the reapportionment plan at issue did not violate section 2 of the Voting Rights Act, nor did it violate the Fifteenth Amendment to the United States Constitution. Nevertheless, the Court held that the Plaintiffs had established a *prima facie* case that the population deviations between the districts violated the Equal Protection Clause, and the Court remanded "only for further proceedings on whether the plan's deviation from equal population among districts violate[d] the Fourteenth Amendment." *Id.* at 1154.

Upon remand, we held that the Ohio reapportionment plan survived scrutiny under the one-person-one-vote guarantee of the Equal Protection Clause because (1) the Defendants advanced a genuine, rational state policy to justify the deviations from population equality among the state legislative districts, (2) their plan reasonably furthered the rational state policy, and (3) the 13.81% and 10.54% total deviations fell within constitutional limits. *Quilter v. Voinovich*, 857 F. Supp. 579, 587 (N.D. Ohio 1994). Accordingly, judgment was entered for the Defendants on this issue.

While the latter decision was pending, however, the Plaintiffs moved this court for permission to amend their complaint in light of the Supreme Court's recent decision

in *Shaw v. Reno*, 113 S. Ct. 2816 (1993).[5] As a lower court, we are bound of course, regardless of the strength of our reservations,[6] to follow the Supreme Court's decision in *Reno*, where the Court held for the first time that a plaintiff could state a claim under the Equal Protection Clause by alleging that a districting plan, "though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Id.* at 2828. We granted the Plaintiffs' motion,[7] and their complaint was

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[5] In dissent, our colleague argues that the Plaintiffs were actually bringing another vote dilution claim rather than a *Shaw v. Reno* claim. Dissenting Op. at [16]. Actually, however, this case is simply a classic example that the same set of facts or circumstances may give rise to more than one cause of action. The Supreme Court clearly denied the Plaintiffs' vote dilution claim under section 2 of the Voting Rights Act, but the Court did not address whether the Apportionment Board's use of race in redistricting, ostensibly as a remedial measure pursuant to the Voting Rights Act, violated the Equal Protection Clause of the Fourteenth Amendment. *See Quilter*, 113 S. Ct. at 1157. The Plaintiffs have brought the latter challenge in the instant case.

[6] We note that critics of the Court's decision in *Shaw* have raised compelling concerns with which we sympathize. *See* A. Leon Higginbotham, Jr., et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 Fordham L. Review 1593 (1994); Brief of the Congressional Black Caucus as *Amicus Curiae* in Support of Appellants, *United States v. Hays*, Nos. 94-558/627, 1995 WL 382080 (U.S. June 29, 1995).

[7] In dissent, our colleague renews his disagreement with our prior decision to allow the Plaintiffs to amend their Complaint and bring a *Shaw v. Reno* challenge to the reapportionment plan. Dissenting Op. at [4-5]; Supp. Dissenting Op. at [2 n.3]. The dissent alleges that our decision violated the mandate rule by exceeding the scope of the remand, and he claims that review of a *Shaw* claim actually "required a new lawsuit and a new draw, with a probable different three-judge panel." *Id.*

In our prior decision, we clarified that "while a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Quilter v. Voinovich*, 157 F.R.D.

accordingly amended.[8] *Quilter v. Voinovich*, 157 F.R.D. 36, 40 (N.D. Ohio 1994).

36, 38-39 (N.D. Ohio 1994) (quoting *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (quotation omitted)). Under the mandate rule, we may not consider on remand the issues that the Supreme Court decided, but we may consider issues that have not been decided. *See id.* at 39 (citing *Jones v. Lewis*, 957 F.2d 260, 262 (6th Cir.), *cert. denied*, 113 S. Ct. 125 (1992); *see id.* at 39 n.1 (citing cases from other circuits holding the same). In this case, the Supreme Court expressly abstained from considering the type of Equal Protection Clause challenge delineated in *Shaw. Voinovich v. Quilter*, 113 S. Ct. 1149, 1157 (1993). Thus, the Court's mandate did not prohibit us from considering the issue on remand.

To support the contention that the Plaintiffs' *Shaw* claim required a new lawsuit, new draw, etc., the dissent cites to some Local Rules that give direction with respect to the appropriate disposition of related cases that are filed separately. *See* Dissenting Op. at [5 n.2]; Supp. Dissenting Op. at [2 n.3]. Yet, these Local Rules would only apply if Plaintiffs had filed a new lawsuit alleging a *Shaw* claim. As such these Local Rules do not support the proposition that the Plaintiffs were "required to file a new lawsuit." Indeed, the dissent offers no supporting authority for this proposition, other than the case law cited in conjunction with the previous argument.

[8] The Plaintiffs' Second Amended Complaint revised the First Amended Complaint in only two respects. First, Count IV, entitled "Violation of the Equal Protection Clause—Segregation of Voters by Race Without Compelling Governmental Justification," is added. Second, the prayer for relief was accordingly revised. In pertinent part, Count IV alleges the following:

> 52. . . . The reapportionment plan adopted by the Defendants on February 18, 1992 intentionally separated Ohio voters on the basis of race without regard for the traditional redistricting principles set forth in the Ohio Constitution and otherwise without any compelling governmental justification. To justify the creation of race-based districts in the urban centers of Ohio, Defendants asserted that there was widespread racial bloc voting throughout Ohio. The trial court specifically found, and the Supreme Court of the United States confirmed, that Ohio did not suffer from legally cognizable racially polarized voting. . . .
>
> 53. The Defendants deliberately created race-based legislative districts in urban centers initially and then used the

Having considered the record evidence and the arguments of the parties, both written and oral, we are prepared to issue our decision.[9] We preface our findings of fact and conclusions of law, however, with a discussion of the governing law that provides the analytical paradigm for our conclusions.

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purported, but sham, necessity of creating such districts as the basis for ignoring the traditonal anti-gerrymandering provisions of the Ohio Constitution throughout the state of Ohio. Absent the ripple effect of the racial gerrymandering in the urban centers of the state of Ohio, the Defendants would not have been forced to ignore on a wholesale basis the directives of Article XI, Section 7, of the Ohio Constitution to follow existing political and legislative boundaries wherever possible.

54. . . . The decision to abandon the traditional districting mandates contained within the Ohio Constitution is neither compelled by the doctrine of federal supremacy, nor based on any lawful, organized, or rational districting criteria. . . .

55. The Defendants have articulated no compelling governmental interest for the wholesale abandonment of the provisions of the Ohio Constitution. As a result, the Defendants have drawn irregular districts in numerous places throughout the state, districts which have no explanation other than the ripple effects caused by the racially drawn districts in the urban centers. In some instances, the racially drawn districts themselves have irregular shapes not required by the Ohio Constitution.

56. The districts which have been modified solely on the basis of race include House Districts 31, 30, 22, 21, 38, 39, 44, and 49. No evidence has been presented to the trial court that either legally cognizable remedial action was necessary to draw these racially gerrymandered districts, or that the creation of such districts was narrowly tailored to further any compelling governmental need.

Pls.' Second Am. Compl. ¶¶ 52-56.

[9] The court also appreciated and considered an *amicus* brief submitted by the United States Department of Justice, which supported the position of the Defendants.

II. First Principles

A. Nature of a Shaw v. Reno Claim

Prior to the Supreme Court's decision in *Reno*, the Court had delineated only two legal theories to support a redistricting challenge under the Equal Protection Clause of the Fourteenth Amendment: (1) violation of the "one-person-one-vote" principle, which requires that districts be equal in population so that the votes cast by voters in one district do not have less weight than those cast by voters in other districts, *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); and (2) a claim of vote dilution, whereby districts are purposefully drawn to unfairly dilute or diminish the voting strength of an identified group of voters, *Rodgers v. Lodge*, 458 U.S. 613 (1982). *Shaw v. Hunt*, 861 F. Supp. 408, 421 (E.D.N.C. 1994), *probable jurisdiction noted*, 63 U.S.L.W. 3916 (U.S. June 29, 1995) (No. 94-923); *see also Reno*, 113 S. Ct. at 2822, 2823, 2828; *Miller v. Johnson*, Nos. 94-631/797/929, 1995 WL 382020, at *23 (U.S. June 29, 1995) (Ginsburg, J., dissenting). In *Shaw v. Reno*, however, the Court announced a third means to challenge legislative redistricting under the Equal Protection Clause. The Court held that "a plaintiff challenging a reapportionment [plan] under the Equal Protection Clause may state a claim by alleging that the [plan], though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." 113 S. Ct. at 2828; *Miller*, 1995 WL 382020, at *3. The Court defined such a deliberate and arbitrary distortion of district boundaries for racial purposes as a "racial gerrymander." [10] *Reno*, 113 S. Ct. at 2823.

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[10] The dissent does not find the Supreme Court's definition of racial gerrymandering "particularly enlightening in view of the apparent conflict of meaning between 'deliberate' and 'arbitrary' actions." Dissenting Op. at [17]. Evidently, the dissent has

The *Reno* Court reasoned that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Id.* at 2824 (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). "They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion), and they "may serve to stimulate our society's latent race-consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs," *United Jewish Organizations v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part). These observations were reiterated in the Court's recent decision in *Miller v. Johnson*:

> When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, "think alike, share the same political interests, and will prefer the same candidates at the polls." Race-based assignments "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution."

1995 WL 382020, at *7 (citations omitted).

For these reasons, the Court has held that racial gerrymandering by state legislatures demands close judicial scrutiny; thus, a race-based redistricting plan can be upheld only if it is narrowly tailored to further a compelling state interest. *Reno*, 113 S. Ct. at 2825, 2826, 2830; *Miller*, 1995 WL 382020, at *3, *7, *13; *see also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (noting that strict

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never recognized that someone deliberately can act in an arbitrary manner.

scrutiny applies not only to legislation that contains explicit racial classifications but also to those "rare" statutes that are "unexplainable on grounds other than race," even though they are race-neutral on their face). Consistent with prior practice, the *Reno* Court made clear that because a racial gerrymander is a racial classification, it must be reviewed with strict scrutiny even if the drafters of the redistricting plan claim that the plan was drawn with the "benign" purpose of enhancing minority voting strength, 113 S. Ct. at 2830 ("Equal Protection Clause demands strict scrutiny of all racial classifications . . . because without it, a court cannot determine whether or not the discrimination truly is "benign."); *id.* at 2826 ("[D]istrict lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption."), or claim that the racial gerrymander benefits or burdens the races equally, *id.* at 2829 (citing *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 1370 (1991) ("It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree."); *see also Miller*, 1995 WL 382020, at *3 (noting that racial and ethnic distinctions of any sort are inherently suspect and require exacting judicial scrutiny regardless of the race of those burdened or benefited by the classification).

Although the Court in *Reno* clearly created a new means to challenge state apportionment plans pursuant to the Fourteenth Amendment, its analysis left many unanswered questions that are integral to the proper resolution of a *Shaw v. Reno* claim: (1) Is circumstantial evidence of "bizarre" district shapes necessary to state and sustain a *Shaw v. Reno* claim?; (2) To what extent must "race" be a factor in an apportionment plan before the plan becomes a racial gerrymander subject strict scrutiny analysis?; (3) Once strict scrutiny is triggered, who has the burden of proof in a *Reno* claim?; (4) What constitutes a "compelling state interest" that would justify

race-based redistricting?; and (5) What is the meaning of "narrowly tailored" in the redistricting context? Some of these questions were answered subsequently in the Court's *Miller* decision. We turn now to consider these issues.

B. Bizarre District Shapes: A Necessary Element?

Relying on *Reno*, the Defendants contend that strict scrutiny is not required in this case because "Plaintiffs have not established that any of the districts in [the 1992 plan] are " 'bizarre' or 'irregular.' " Defs.' Post Trial Br. at 55. This raises the question of whether the presence of bizarre district shapes is a necessary element or a threshold requirement to state a *Shaw v. Reno* claim.

Undeniably, the Court in *Reno* emphasized that the new cause of action under the Fourteenth Amendment was based on the presence of districts whose shapes were so irregular or bizarre that they rationally could not be understood as anything other than an effort to segregate voters on the basis of race. 113 S. Ct. at 2828, 2832. Such districts, however, do not draw close constitutional review simply because of their irregular shape. Adherence to traditional districting principles, such as compactness, contiguity, and respect for political subdivisions, is not a constitutional requirement. *Id.* at 2827 (citing *Gaffney v. Cummings*, 412 U.S. 735, 752 & n.18 (1973)). Rather, bizarre-shaped districts demand strict scrutiny because their shape is circumstantial evidence that race has been a purposeful factor in their creation. *See Karcher v. Daggett*, 462 U.S. 725, 755 (1983) (Stevens, J., concurring) ("One need not use Justice Stewart's classic definition of obscenity—'I know it when I see it'—as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation." (footnotes omitted)). Logically, therefore, the Supreme Court's use of a district's shape as circumstantial evidence of racial intent implies that proof can be made "by any means, including state concession,

bizarre shape, or some combination of the various factors typically used to prove the 'intent' element of an equal protection claim under *Arlington Heights*." *Hunt*, 861 F. Supp. at 431; *see Arlington Heights*, 429 U.S. at 266 ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").

The validity of this reasoning was recently confirmed by the Court in *Miller*:

> Our observation in *Shaw* of the consequences of racial stereotyping was not meant to suggest that a district must be bizarre on its face before there is a constitutional violation. Nor was our conclusion in *Shaw* that in certain instances a district's appearance (or, to be more precise, its appearance in combination with certain demographic evidence) can give rise to an equal protection claim, 509 U.S., at —— (slip op., at 17), a holding that bizarreness was a threshold showing, as appellants believe it to be. Our circumspect approach and narrow holding in *Shaw* did not erect an artificial rule barring accepted equal protection analysis in other redistricting cases. Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines. The logical implication, as courts applying *Shaw* have recognized, is that parties may rely on evidence other than bizarreness to establish race-based districting.

1995 WL 382020, at *8. Thus, "parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold

showing of bizarreness" in order to state a valid *Shaw v. Reno* claim. *Miller*, 1995 WL 382020, at *9.

Now that we have discussed the types of evidence that a party can marshall to sustain a *Shaw v. Reno* claim, we turn to consider both the extent to which race must be a factor in an apportionment plan before the plan becomes a racial gerrymander subject to strict scrutiny and the party that bears that burden of proof.

C. The Trigger for Strict Scrutiny

The Court in *Reno* did not specify the threshold showing of racial consideration that was necessary to establish that a redistricting plan was a racial gerrymander requiring close judicial scrutiny. The Court did, however, narrow the spectrum by significantly reiterating the principle that "awareness" of race or "race consciousness" in the districting process is not equivalent to a racial gerrymander that requires strict scrutiny analysis:

> [R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.

113 S. Ct. at 2826 (emphasis in original).

In *Miller v. Johnson*, the Court clarified the burden of proof necessary to trigger strict scrutiny:

> Although race-based decisionmaking is inherently suspect, until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed. . . . The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the *predominant factor* motivating the leg-

> islature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can "defeat a claim that a district had been gerrymandered on racial lines."

1995 WL 382020, at *10 (citations omitted and emphasis added).

Despite this clarification, there remains some ambiguity regarding the *Miller* "predominant factor" test. Specifically, what did the majority mean when it said that a plaintiff must prove that the legislature "subordinated" traditional districting principles to racial considerations in order to trigger strict scrutiny? Does this mean that a plaintiff must prove that the legislature disregarded or abandoned traditional districting principles in favor of racial considerations or does it mean that strict scrutiny will be triggered even if a state legislature follows traditional districting principles, simply because those principles were accorded less emphasis or less weight than racial considerations?

The ambiguity inherent in the *Miller* Court's predominant factor test is highlighted by the concurring opinion of Justice O'Connor and the dissenting opinion of Justice Ginsburg. Although no other justice joined her opinion, Justice O'Connor wrote separately to emphasize her understanding of the Court's predominant factor test:

> I understand the threshold standard the Court adopts—"that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations,"—to be a demanding one. To invoke

> strict scrutiny, a plaintiff must show that the State has relied on race *in substantial disregard* of customary and traditional districting practices.

Miller, 1995 WL 382020, at *17 (O'Connor, J., concurring) (citation omitted and emphasis added). Justice Ginsburg in dissent, joined by Justices Stevens, Breyer, and Souter, interpreted the Court's new predominant factor test differently:

> Today the Court expands the judicial role, announcing that federal courts are to undertake searching review of any district with contours "predominantly motivated" by race: "strict scrutiny" will be triggered not only when traditional districting practices are *abandoned*, but also when those practices are *"subordinated to"—given less weight* than race. Applying this new "race-as-predominant-factor" standard, the Court invalidates Georgia's districting plan even though Georgia's Eleventh District, the focus of today's dispute, bears the imprint of familiar districting practices.

Id. at *21 (Ginsburg, J., dissenting) (citation omitted and emphasis added).

The majority, itself, recognized, as it had in *Shaw*, 113 S. Ct. at 2827, that a legislature's compliance with traditional districting principles may well suffice to defeat a claim of racial gerrymandering, but such a refutation was not possible in *Miller* because the Court found that the State of Georgia had subordinated those factors to racial objectives. *Miller*, 1995 WL 382020, at *12. As proof of subordination, the majority pointed to an objection of Georgia's Attorney General that was lodged with the Justice Department in response to the Justice Department's demand for three majority-black districts in Georgia. *Id.* The State Attorney General claimed that to comply with such a demand the State would have to " 'violate all reasonable standards of compactness and contiguity.' " *Id.* The Court found such a statement to

be "powerful evidence that the legislature subordinated traditional districting principles to race when it ultimately enacted a plan creating three majority-black districts." *Id.* Nevertheless, a fair interpretation of this language does not lead to the conclusion that "subordination" can only be proven if a state abandons or violates traditional districting principles in favor of racial considerations. In fact, as Justice Ginsburg pointed out in dissent, Georgia's Eleventh District, which the majority held to be an example of "subordination," actually bore "the imprint of familiar districting practices." *Id.* at *21 (Ginsburg, J., dissenting); *id.* at *24-25 (Ginsburg, J., dissenting) (noting specifically how the Eleventh District's design reflects the significant consideration of traditional districting factors).

Moreover, the conclusion that "subordination" can only be proven if a state abandons or violates traditional districting principles in favor of racial considerations constitutes a logical fallacy. The presupposition of such a conclusion is that if districts are drawn on the basis of traditional districting principles—compactness, contiguity, etc., then such districts cannot be the result of racial gerrymandering. Such a conclusion is fallacious because it is certainly possible, both logically and factually, that districts could be crafted within the confines of traditional districting principles and still be predominantly motivated by racial considerations at the same time. Furthermore, to conclude otherwise accords a preclusive constitutional significance to a state's compliance with traditional districting principles, which exceeds the significance accorded by the Court. *See Reno*, 113 S. Ct. at 2816.

Taken together, all of this language leads us to conclude that a plaintiff may satisfy the predominant factor test and prove that traditional districting principles were subordinated to racial objectives not only when a state violates or abandons traditional districting principles in favor of racial motivations but also when a state substantially complies traditional districting principles and

gives them less weight in the apportionment process than racial considerations.

Although the Plaintiffs in this equal protection challenge bear the ultimate burden of persuasion throughout the proceeding, *see id.* at *10; *Batson v. Kentucky*, 476 U.S. 79, 93-94 & n.18 (1986); *Wygant*, 476 U.S. at 277-78, if the Plaintiffs offer proof substantiating that race was the predominant factor motivating the state's apportionment process, then this gives rise to a presumption that the plan is unconstitutional, and the burden shifts to the Defendants to demonstrate that their use of race was narrowly tailored to meet a compelling state interest, *see Croson*, 488 U.S. at 505; *Hunt*, 861 F. Supp. at 436. Yet, the Defendants' shifted burden is one of production only, not persuasion. The Plaintiffs still bear the ultimate burden of persuading the court that the Defendants did not have a compelling state interest that justified their use of race in apportionment process or that the Defendants' redistricting plan was not narrowly tailored to meet such an interest. *See Wygant*, 476 U.S. at 292-93 (O'Connor, J., concurring); *Hunt*, 861 F. Supp. at 436.

D. Compelling State Interest

Next, we consider those reasons that might serve as a compelling state interest, justifying a state's decision to engage in race-based redistricting. At this point, we are not concerned with whether the Defendants in this case had a compelling justification for their consideration of race in the 1992 plan; we are concerned with whether the Defendants had a compelling justification for *any* redistricting plan that considered race as a predominant factor. The question of "whether the particular plan under challenge takes race into account to a greater degree than necessary to further a compelling state interest is a question for the 'narrowly tailored' prong of the strict scrutiny analysis, which examines the 'fit' between the compelling state interest and the precise means

chosen by the state to accomplish it." *Hunt*, 861 F. Supp. at 437 (citing *Wygant*, 476 U.S. at 280 & n.6, and *Fullilove*, 448 U.S. at 507 (Powell, J., concurring)). Without presenting an exhaustive review of those reasons that theoretically might serve as a compelling state interest in the redistricting context, we have chosen to limit our discussion to the compelling interest that the Defendants have offered in this case—compliance with section 2 of the Voting Rights Act. Defs.' Post Trial Br. at 57-63.

In *Shaw v. Reno*, the state argued that compliance with the Voting Rights Act was a compelling state interest. 113 S. Ct. at 2830. The Court, however, stopped short of totally endorsing this claim: "The states certainly have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied." *Id.*; *see Miller*, 1995 WL 382020, at *13. Obviously, the Court is aware that in strict scrutiny parlance a "compelling state interest" is a term of art. Thus, we do not think the Court's choice of the words "very strong interest" is insignificant. It suggests to us that the Voting Rights Act may serve as a compelling state interest in some circumstances, but in others, state action ostensibly in conformity therewith may violate the Equal Protection Clause of the Fourteenth Amendment. *See Miller*, 1995 WL 382020, at *13; *see also Johnson v. De Grandy*, 114 S. Ct. 2647, 2666-67 (1994) (Kennedy, J., concurring) ("Given our decision in *Shaw*, there is good reason for state and federal officials with responsibilities related to redistricting [that are engaging in remedial action pursuant to section 2 of the Voting Rights Act], as well as reviewing courts, to recognize that explicit race-based districting embarks us on a most dangerous course. It is necessary to bear in mind that redistricting must comply with the overriding demands of the Equal Protection Clause.").

Previously, the Court has recognized a state's compelling interest in taking race-based remedial measures to

eradicate the effects of past racial discrimination. *Miller*, 1995 WL 382020, at *13 (citing *Reno*, 113 S. Ct. at 2831 (citing *Croson*, 488 U.S. at 491-93; *Wygant*, 476 U.S. at 280-82)). Furthermore, the Court has recognized that this interest extends to remedying past or present violations of federal statutes that were intended to eliminate discrimination in specific aspects of life. *See Croson*, 488 U.S. at 500 ("constitutional or statutory violation"); *Wygant*, 476 U.S. at 289 (O'Connor, J., concurring) ("violation of federal statutory or constitutional requirements"). Moreover, the Court has clarified that a state does not have to await a judicial finding that it has committed past or present discrimination before it voluntarily takes remedial action to eradicate the discrimination, so long as it has a " 'strong basis in evidence for its conclusion that remedial action was necessary.' " *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277); *Miller*, 1995 WL 382020, at *13, *14; *Hunt*, 861 F. Supp. at 437.

Applying these principles to the redistricting context and the Voting Rights Act, the *Hunt* court developed a very useful standard by which to determine when the Voting Rights Act can serve as a compelling state interest:

> Under these principles, we think it clear that a state has a "compelling" interest in engaging in race-based redistricting to give effect to minority voting strength whenever it has a "strong basis in evidence" for concluding that such action is "necessary" to prevent its electoral districting scheme from violating the Voting Rights Act.
>
> . . . .
>
> A state has a "strong basis in evidence" for concluding that it must engage in race-based redistricting in order to comply with the Voting Rights Act when it has information sufficient to support a *prima facie* showing that its failure to do so would violate

> the Act. *See Croson*, 488 U.S. at 500 (majority) (evidence "approaching a prima facie case of a constitutional or statutory violation").

Hunt, 861 F. Supp. at 437-439; *see Johnson v. Miller*, 864 F. Supp. 1354, 1381 (S.D. Ga. 1994), *aff'd*, 1995 WL 382020 (U.S. June 29, 1995).

Generally, to establish a prima facie case that a single-member redistricting plan violates section 2 of the Voting Rights Act, a plaintiff must show three things, the *Gingles* preconditions:

> First, [the plaintiff] must show that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district.' " Second, [the plaintiff] must prove that the minority group " 'is politically cohesive.' " Third, the plaintiff[] must establish " 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' "

Voinovich v. Quilter, 113 S. Ct. at 1157 (quoting *Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986))); *Johnson*, 864 F. Supp. at 1387; *Hunt*, 861 F. Supp. at 440. Thus, when a state has reliable information that indicates the relevant minority group could establish a prima facie challenge under section 2 of the Voting Rights Act to the existing districting plan, then it has a "strong basis in evidence" for concluding that it must engage in race-based redistricting to comply with section 2 of the Voting Rights Act, and it has established a "compelling interest" for the remedial measures. *Hunt*, 861 F. Supp. at 440.

E. Narrowly Tailored

Finally, we consider how to determine whether a racial gerrymander, if justified by a compelling state interest, is narrowly tailored to further that interest. The Court

provided little help with this issue in *Reno*, other than to say that in the context of a challenge under section 5 of the Voting Rights Act, "[a] reapportionment plan would not be narrowly tailored if the State went beyond what was reasonably necessary to avoid retrogression." Therefore, we agree with the *Hunt* court that the best analytical approach is to examine the Court's decisions that apply the narrowly tailored standard in other race-based remedial contexts. *See Hunt*, 861 F. Supp. at 444-45.

In other race-based contexts, the Court has examined five factors to determine whether a race-based affirmative action plan is narrowly tailored to serve the compelling state interest in remedying the discrimination: (1) the efficacy of alternative remedies that were less race-based or race-neutral; (2) whether the plan utilizes a fixed racial quota or a flexible racial goal; (3) the duration of the plan; (4) the relationship between the plan's goal for minority representation in the pool of applicants selected to receive the affirmative action and the percentage of minorities in the relevant pool of eligible candidates; and (5) the impact of the plan on the rights of third parties. *See United States v. Paradise*, 480 U.S. 149, 171-85 (1987) (plurality); *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 485-89 (1986) (Powell, J., concurring); *see also Croson*, 488 U.S. at 507-08; *Wygant*, 476 U.S. at 279-84. Although these criteria were developed in contexts other than race-based redistricting, we think they are easily adapted to this context. While we have engaged in a rigorous analysis, our inquiry has been careful and sensitive.

Considering the first factor, a court must decide whether the state could have accomplished its compelling interest by some means that were less race-based or race-neutral. *Wygant*, 476 U.S. at 280 n.6. If compliance with the Voting Rights Act is a state's compelling interest then, obviously, a race-neutral alternative does not exist. Assuming race must be considered to comply with the Voting Rights Act, the question then becomes whether

a state could have complied with the Voting Rights Act with means that were less race-based. The Plaintiffs in this case do not allege that the Apportionment Board created more majority-minority districts than is reasonably necessary to comply with the Voting Rights Act. Rather, they generally claim that the Board packed black voters into districts to comprise less than a majority, where a black minority population, in conjunction with significant white crossover votes, already had ample opportunity to elect the candidate of its choice without the addition of the black voters. This packing of black voters into districts where they were not needed allegedly resulted in a waste of black votes in the "packed" districts and a loss of minority "influence" in those districts where the black voters were previously located. Assuming *arguendo* that such race-based measures truly further compliance with section 2 of the Voting Rights Act, the analytical question becomes a two-fold concern: whether the 1992 plan creates more "packed" districts than is reasonably necessary to comply with the Act and whether the "packed" districts it creates contain substantially larger concentrations of minority voters than is reasonably necessary to give minority voters a realistic opportunity to elect representatives of their choice in those districts. *See Hunt*, 861 F. Supp. at 446.

Regarding the second factor, a court must determine whether the challenged plan requires a fixed racial quota that is crafted to achieve a racial balance or requires a flexible goal to be used as a standard in gauging the state's efforts at eradicating the discrimination in question. *See Sheet Metal Workers*, 478 U.S. at 477-78. We agree with the *Hunt* court that racial gerrymanders will "seldom be invalid on this ground" because they do not impose a fixed racial quota. 861 F. Supp. at 446. Even if a state creates a certain number of districts that are designed to elect minority representatives, there is no guarantee that minority representatives will be elected. Thus, such districts can hardly be viewed as anything

other than examples of an acceptable, flexible goal for minority representation. *See Sheet Metal Workers*, 478 U.S. at 487-88.

The third factor invokes consideration of the planned duration of the remedial measure. If it is not a temporary provision, it may last longer than reasonably necessary to eliminate the effects of the targeted discrimination. *See id.* at 479 (noting that a temporary race-based remedial measure is acceptable because it "will end as soon as . . . it is no longer needed to remedy past discrimination"). A race-based redistricting plan in Ohio will likely satisfy this test because the State is required, as a practical matter, to redistrict after each decennial census, and this will result in re-consideration and possible termination of the previous race-based plan.

The fourth factor requires the court to consider whether the remedial plan presents a reasonable relationship between the plan's goal for minority representation in the pool of applicants selected to receive the affirmative action and the percentage of minorities in the relevant pool of eligible candidates. As applied to the redistricting context, we think this requirement is satisfied so long as the percentage of racially-packed districts does not substantially exceed the percentage of minority voters throughout the state. *See Johnson v. De Grandy*, 114 S. Ct. at 2658 & n.11 (noting that ultimate right of section 2 of Voting Rights Act is minority voters' equal opportunity to elect candidate of their choice, as measured by proportionality between percentage of majority-minority voting districts in state to minority members' share of the relevant population throughout the state).

The fifth factor requires a court to consider whether the challenged plan "impose[s] an unacceptable burden on innocent third parties." *Paradise*, 480 U.S. at 182. As applied to the redistricting context, we agree with the *Hunt* court that "a race-based redistricting plan imposes an unacceptable burden upon third parties, [and] hence

is not sufficiently 'narrowly tailored' to survive constitutional muster, if it fails to comply with redistricting principles that are themselves constitutionally mandated, like the 'one person, one vote' standard and the prohibition against undue dilution of the voting strength of any identifiable group of voters." *Hunt*, 861 F. Supp. at 449. Like the *Hunt* court, however, we do not think that a racial gerrymander imposes an unacceptable burden on third parties simply because the redistricting plan has a bizarre shape or deviates from traditional districting principles, which, themselves, are not constitutionally mandated.[11] *Id.* at 449-56.

At this point we note that it is important for all the issues presented in this case to be analyzed in a way that gives expression to the constitutionally and statutorily based national goal of protecting the rights of persons victimized by historic discrimination, so that they may effectively participate in changing public policies to "ensure nondiscrimination and fair opportunities in education, employment, housing, and other areas." Arthur A. Baer & Pamela S. Karlan, *Voting Rights Act Enforcement: An Agenda for Equal Electoral Opportunity, in New Challenges, The Civil Rights Record of the Clinton Administration Mid-term* 169 (Report of the Citizen's Commission on Civil Rights, 1995). Court decisions of today must be mindful of the Supreme Court's admonition over one hundred years ago in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), that the right to vote is a "fundamental political right, because preservative of all

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[11] Consider the words of Chief Justice Warren Burger in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), where the Court considered and approved the use of race-sensitive remedies to combat segregated schools. "The remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations; and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school system." *Id.* at 28.

rights." The issue presented in this case must not be responded to in such a way as to gut the Voting Rights Act's promise of equal electoral opportunity. When minority voters are deliberately and purposefully packed into a district where they are unnecessary to the election of the minority's candidate of choice, who is capable of "changing public policies," such a plan must be justified by a compelling governmental purpose. This is particularly true when the effect of such a scheme is likely to be to reduce the opportunity for minority voters to coalesce with other voters to influence the election of candidates of their choice in the districts from which they are drawn. When this occurs the very spirit of the Voting Rights Act is eroded. The risk has prompted us to reject portions of the 1992 plan at issue here.

III. Findings of Fact and Conclusions of Law

Based on our review of the evidence submitted by both parties, we find, for the following reasons, that racial considerations were the predominant factor in the Defendants' 1992 reapportionment plan:

1. The Plaintiffs' claims of racial gerrymandering are somewhat unusual in this case. First, they allege that the Defendants drew race-based legislative districts in the urban areas of Ohio and that this decision had the ripple effect of causing irregular shaped districts throughout the State, which violated the traditional districting principles embodied in the Ohio Constitution, particularly Article XI, § 7. Pls.' Second Am. Compl. ¶ 55. In addition, the Plaintiffs alleged that some of the race-based districts, themselves, had irregular shapes in violation of the traditional districting principles contained in the Ohio Constitution. *Id.* Finally, the Plaintiffs alleged that the racially gerrymandered districts "included" House districts 31, 30, 22, 21, 38, 39, 44, and 49. *Id.* ¶ 56. The Defendants contend that the Plaintiffs are limited to challenging only these eight districts,

which were identified in their complaint. The Defendants, however, mischaracterize the Plaintiffs' complaint. The word "included" clearly is not an exclusive term. Thus, the eight districts identified in the complaint were illustrative of the alleged race-based districts but not necessarily an exclusive listing of them. That said, however, we note that we are not concerned with districts whose irregular shape may have been the ripple effect of another district that was racially gerrymandered. Such an irregular district may indeed violate proscriptions of the Ohio Constitution, but the focus of a *Shaw v. Reno* claim is racial gerrymandering in violation of the Fourteenth Amendment to the United States Constitution. Thus, we are only concerned in this case with districts that allegedly have been racially gerrymandered.

2. The Defendants admittedly considered race when drafting their 1992 apportionment plan. The Apportionment Board instructed Tilling to "draw a plan that was in comportment with the Ohio Constitution, the Fourteenth and Fifteenth Amendments of the United States Constitution and the Voting Rights Act," and Tilling attempted to comply. Hr'g Tr. at 208. Tilling considered race to avoid dilution of minority voting strength in violation of the Voting Rights Act. *Id.* at 308.

3. Before Tilling drafted an apportionment plan, he attended public hearings throughout the state. At these hearings the Apportionment Board heard testimony from some members of the minority community requesting the Board to enhance minority voting strength by creating more majority-minority districts. Defendants' Post-Trial Br. at 2-3. At these hearings, Tilling publicly stated that consideration of and compliance with the Voting Rights Act was an important principle guiding the apportionment process. *Id.* at 3-5.

4. The Appointment Board's Findings and Conclusions, adopted on February 18, 1992,[12] in support of the 1992 plan, reveal not only that race was a substantial and motivating factor in the reapportionment process but that it was the predominant factor in certain house districts. Based on the conclusions that the Voting Rights Act protected classes of voters, not incumbents, *see, e.g.*, Bd. Findings ¶¶ 177, 183, and that racial bloc voting existed throughout the State of Ohio, including districts containing minority voters, *id.* ¶¶ 124, 167, the Apportionment Board decided that it needed to create districts that would contain sufficient black population to guarantee the election of any new (non-incumbent) black candidate. Thus, the Board through Tilling added black voters to minority districts outside of Cuyahoga County because "there [wa]s insufficient black population in the minority districts to guarantee the election of a black candidate particularly given levels of voter turnout and racial bloc voting in the district." *Id.* ¶ 168. Obviously, one of the working assumptions in this process was that black voters would choose only a black candidate as their representative. This is clearly one of the demeaning and offensive assumptions that the Supreme Court has previously criticized as an impermissible racial stereotype. *See Miller*, 1995 WL 382020 at *7 (citing *Reno*, 113 S. Ct. at 2827).

5. The Board's analysis of incumbency elections in minority districts for 1984, 1986, 1988, and 1990, revealed an incumbency advantage of six to ten percent, *id.* ¶ 171, 173, and the Board concluded that it was unreasonable to configure districts based on

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[12] The Apportionment Board has not met since February 18, 1992, either to change or modify its findings regarding the 1992 plan. Thus, these findings constitute direct evidence of the Apportionment Board's rationale and justification for the 1992 plan.

the current incumbent because the successful incumbents might retire, die, or move on to other political positions during the 90's, *id.* at 172. *See also* Bd. Conclusion of Law ¶ 9 ("It is unreasonable to reconfigure minority districts based on the electoral success of minority incumbents. Further, such reconfiguration will result in impermissible minority vote dilution. Consideration of factors such as racial bloc voting, voter turnout, population shifts, demographics, incumbency factors, voting patterns and other such factors require that minority districts outside Cuyahoga County must reflect increased relative percentages of black voting age population.") Accordingly, the Board determined that "unless Black Voting Age Population margins are adopted in minority districts, minorities risk losing minority districts." Bd. Findings ¶ 174.

6. In Franklin County, the Board drew district lines to enhance the possibility of electing a new black candidate. Board Finding 189 indicates that Tilling "reconfigured House districts 29 and 31 in Franklin County to protect minority voters in those districts and to create a minority Senate District in Franklin County where none previously existed." *Id.* ¶ 189. Tilling testified that the incumbent black legislators, Reps. Miller and Beatty, had indicated a desire to run for different offices, and because the Voting Rights Act protects classes of voters and not incumbents, black voters were added to the districts of Reps. Miller and Beatty to achieve this goal. *Id.* ¶ 189. The percentage of black population in Rep. Miller's district, H.D. 22 under the 1992 plan, was increased from 38.50% to 44.68% (40.98% black voting age population), a 6.18% increase, which is within the 6-10% standard that would be necessary to compensate for the possible loss of incumbency advantage. Defs.' Supp. Exs., Vol I, Ex. DD. Likewise, the black population in Rep. Beatty's district, H.D. 21

under the 1992 plan, was increased from 46.80% to 54.30% (48.30% black voting age population), an increase of 7.50%. *Id.* Both Miller and Beatty previously had been elected to six and seven terms, respectively, Bd. Findings ¶ 162, by pluralities of better than two-to-one.

7. In Lucas County, the Board drew lines to enhance the possibility of electing a new black candidate. Tilling stated that he drew the districts in Lucas County "to protect a class of voters, not the particular incumbent in that situation." *Id.* ¶ 177. Tilling added additional minority votes to Rep. Casey Jones' district, H.D. 49 under the 1992 plan, "not because Casey Jones needed them but because down the road in this decade whoever is his successor needs the opportunity to give minorities a clear chance to elect a candidate of their choice." *Id.* Moreover, Tilling accepted the rationale of increasing minority voters in Casey Jones district because the growth of the University of Toledo had displaced a number of individuals, causing some shift of population in his district, and because Jones might be nearing retirement age. *Id.* ¶ 195. The black population in Jones' district was increased from 41.70% to 49.99% (46.42% black voting age population), an increase of 8.29%. Defs.' Supp. Exs., Vol I, Ex. DD.

8. In Summit County, the Board drew lines to enhance the possibility of electing new black candidates. Based on the conclusion that Rep. Vernon Sykes' district, H.D. 44 under the 1992 plan, was "losing black population and to avoid minority vote dilution," Bd. Findings ¶ 194, the Board increased the black population in Sykes' district from 35.40% to 43.07% (39.86% black voting age population), an increase of 7.67%, Defs.' Supp. Exs., Vol I, Ex. DD. Previously Sykes had been elected to five terms by margins of two-to-one. Bd. Findings ¶ 162.

9. In Montgomery County, the Board drew lines to guarantee the election of new black candidates. Again, based on "population shifts" and the desire to "avoid dilution of minority voting," the Board increased the black population in Rep. McLin's and Rep. Roberts' districts, H.D. 38 and H.D. 39, respectively under the 1992 plan. *Id.* ¶ 193. The black population in McLin's district was increased from 42.10% to 44.47% (41.56% black voting age population), an increase of 2.30% and the black population in Roberts' district was increased from 36.10% to 40.69% (36.71% black voting age population), an increase of 4.59%. Defs.' Supp. Exs., Vol. I, Ex. DD.

10. In Hamilton County, the Board drew lines to enhance the possibility of electing new black candidates.

The Board found the following:

> Mr. Tilling, in drafting the 1991 Apportionment Plan, also determined that the Voting Rights Act protected classes of voters not incumbents. Since Representative Mallory is in his 60's, there is a particular need to reconfigure House District 23 [H.D. 31 in the 1992 plan] to increase the relative percentage of black population in that district in order to provide an opportunity for a new black candidate, without the benefit of incumbency, to be elected in the district.

Bd. Findings ¶ 183. Accordingly, the Board increased the black population in Mallory's district from 45.90% to 49.16% (43.13% black voting age population), an increase of 3.26%. Defs.' Supp. Exs., Vol. I, Ex. DD. The Board also increased the black population in Rep. Rankin's district, H.D. 30 in the 1992 plan, from 53.20% to 55.98% (52.72% black voting age population), an increase of 2.78%

in a district that was already a majority-minority district. *Id.* The Board increased the black population in Rankin's district allegedly because "[a] new black candidate would require a district with increased black population to be successful." Bd. Findings ¶ 186.

11. In addition to the Apportionment Board's Findings and Conclusions, Tilling, who was the principal architect of the apportionment plan, kept handwritten notes that indicated his procedure and his predominant use of race in drawing the original apportionment plan. *See* Pls.' Ex. Prior Proceeding B, No. 120. The notes revealed that in his first five steps Tilling calculated the ideal population size of the Senate and House districts, pursuant to Article XI, Section 2 of the Ohio Constitution, and determined those counties that had populations within five percent of the ideal in accordance with Article XI, Section 10 of the Ohio Constitution. Beginning with step six and continuing with each urban county thereafter, the notes repeatedly indicate that Tilling displayed the minority population of each urban county on his computer screen and then drew the "minority districts" first before proceeding. This process and the heightened attention to racial composition was confirmed at the hearing when Tilling testified concerning the maps of the urban districts drawn in accordance with the process contained in the notes. Hr'g Tr. at 344-51. Viewed sequentially, the maps indicated that for each urban county, the minority population was displayed; the most heavily black districts were drawn first; and each succeeding district that was drawn contained a decreasing percentage of black population. The Plaintiffs claim that the maps in conjunction with the notes establish that race was "the predominant concern of Mr. Tilling and the Board." Pls.' Post Trial Br. at 14. The Defendants

contend that Tilling's notes and the corresponding maps are irrelevant because they refer to the original "model" plan that Tilling submitted to the Board on September 26, 1991. Although it is true that this exact plan was never in effect and was modified on numerous occasions, we still find it probative of the Defendants' predominant consideration of race in the redistricting process. The fact remains that a not-too-distant forerunning of the 1992 plan was drawn in the aforementioned manner, and the Defendants do not contend that the 1992 plan totally discarded the procedure and results of the original plan.[12]

12. At this point we note that for purposes of this case, we assume without holding that the Apportionment Board substantially complied with the traditional districting principles mandated in Article XI of the Ohio Constitution. Based on our earlier analysis of the *Miller* Court's predominant factor test, *see supra* part II.C., we find it unnecessary to specifically address whether the Defendants complied with the traditional districting principles contained in the Ohio Constitution because even if a state substantially adheres to traditional districting principles, a plaintiff can still prove that racial objectives were the predominant factor in the apportionment process if tra-

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[12] Originally, the dissent agreed that the notes of Tilling "strongly suggest[ed] that he purposefully considered race when he drew the house district boundaries in Amendment D" and that this evidence of race-based action should trigger strict scrutiny. Dissenting Op. at [17 n.9]; *see also* Dissenting Op. App. A. ¶¶ 21, 23, 30, 38, 45, 53, 60, 68, and 75. In light of the Supreme Court's adoption of the predominant factor test in *Miller*, however, the dissent has changed its position and decided that Tilling's notes are not sufficient to trigger strict scrutiny. Supp. Dissenting Op. at [5 & n.4]. Nevertheless, the dissent continues to ignore totally the better and more complete direct evidence of the Board's race-based redistricting that was contained in the Board's Findings and Conclusions, which were adopted specifically in support of the 1992 plan. *See supra* part III., ¶¶ 4-10.

ditional districting principles were subordinated to—given less weight than—racial considerations. *See Miller*, 1995 WL 382020, at *10; *id.* at *21 (Ginsburg, J., dissenting). Nevertheless, we note that the Board's compliance with the traditional districting principles in the Ohio Constitution is a hotly contested matter, *see* Pls.' Post-Hr'g Br. at 36-49, on which we have previously chosen to abstain, *see Quilter*, 794 F. Supp. at 702.[14]

13. Based on our thorough review and consideration of all the evidence presented in this case, we find that race was the predominant motivating factor in the Defendants' creation of House districts 21, 22, 30, 31, 38, 39, 44, and 49 in the 1992 plan because traditional districting principles were subordinated to or given less weight in the reapportionment process than racial considerations. These House districts are the result of racial gerrymandering. Although none

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[14] Were we to decide to consider this issue, however, we note that as a preliminary matter we would have to decide whether this court was precluded from addressing the constitutionality of the 1992 plan under Article XI of the Ohio Constitution because of the Ohio Supreme Court's previous decision in *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992) (per curiam). Ultimately, under the Ohio Constitution, the Ohio Supreme Court held the following: "The court finds against the counterclaimants on their claim that the plan is unconstitutional and, accordingly, we find the plan to be constitutional." *Id.* at 1022. Nevertheless, careful examination of the per curiam opinion reveals that the court was specifically addressing the constitutionality of Senate district 32 under sections 4, 9, and 11 of Article XI of the Ohio Constitution. Thus, Plaintiffs in the instant case argued before this court that the Ohio Supreme Court did not rule on the constitutionality of the challenged house districts under sections 7 and 10 of Article XI of the Ohio Constitution and that this court, accordingly, was not precluded from addressing the issue. The Defendants, however, have argued that this court is precluded from addressing the constitutionality of the reapportionment plan under the Ohio Constitution because the Ohio Supreme Court specifically stated that "the plan" was constitutional, meaning the whole plan.

of these districts presents a bizarre shape, both direct evidence from trial testimony and the Apportionment Board's Findings and Conclusions, and circumstantial evidence from Tilling's notes and accompanying maps, clearly reveal that the Defendants intentionally crafted these eight districts with the predominant purpose of separating voters on the basis of race.

14. Because race was the predominant motivating factor in the drafting of these eight districts in the 1992 plan, they must be subjected to strict scrutiny analysis. *Miller*, 1995 WL 382020, at *13. Thus, the burden of production shifts to the Defendants to show that House districts 21, 22, 30, 31, 38, 39, 44, and 49 in the 1992 plan were narrowly tailored to meet a compelling state interest. *See id.; Croson*, 488 U.S. at 505; *Hunt*, 861 F. Supp. at 436.

15. The Defendants claim that compliance with section 2 of the Voting Rights Act was the compelling state interest that justified their race-based redistricting. Defs.' Post Trial Br. at 57-63.

16. The Defendants agree that in order to show that section 2 of the Voting Rights Act was a compelling state interest, they must have a strong basis in evidence that race-based redistricting was necessary as a remedial measure to comply with the Voting Rights Act. *Id.* at 59-60. Moreover, the Defendants agree that a state has a "strong basis in evidence" to conclude that it needs to engage in race-based redistricting to comply with section 2 of the Voting Rights Act when the state has information that is reasonably sufficient to lead it to conclude that the relevant minority group could make out a prima facie section 2 challenge to the existing plan. *Id.* at 59, 60, 63.

17. As we noted earlier, a plaintiff can establish a prima facie case of a violation of section 2 of the Voting Rights Act by providing evidence that satisfies the three *Gingles* preconditions:

> First, [the plaintiff] must show that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district.' " Second, [the plaintiff] must prove that the minority group " 'is politically cohesive.' " Third, the plaintiff[] must establish " 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' "

Voinovich v. Quilter, 113 S. Ct. at 1157 (quoting *Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986))).

18. Assuming without holding that the Defendants possessed information that would lead them to reasonably conclude that a plaintiff could satisfy the first two *Gingles* factors, we hold that the Defendants did not have a "strong basis in evidence" to engage in race-based redistricting in House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan because they did not possess information that would reasonably lead them to conclude that a plaintiff could satisfy the third *Gingles* factor in these districts—the presence of racial bloc voting.

19. Both this court and the Supreme Court previously held on the basis of all the evidence, that racially polarized voting generally did not exist in Ohio's legislative elections. The Court noted the following:

> [A]ppellees [Plaintiffs in this case] have failed to demonstrate *Gingles*' third precondition—sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice. The District Court specifically found that 0hio does not suffer from "racially polarized voting." 794 F. Supp. at 700-01. Accord, App. to Juris. Statement 132a-134a, and n.2, 139a-140a. Even appellees agree. *See* Tr. of

> Oral Arg. 25. Here, as in *Gingles*, "in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." *Gingles*, 478 U.S. at 49 n.15, 106 S. Ct. at 2766 n.15.

Quilter, 113 S. Ct. at 1158; *see also Quilter*, 1992 WL 677145, at *4 & n.2, n.3, *8 (holding that Ohio has coalitional voting, where whites cross over and vote for black candidates, and not polarized voting, where whites vote for white candidates and blacks vote for black candidates). By relying on these precedents, we are not saying that the Apportionment Board could not take race into account unless and until it had been proven in a court that a violation of section 2 of the Voting Rights Act had occurred. As we noted earlier, a state is not required to await a judicial finding that it has committed past or present discrimination before it voluntarily takes remedial action to eradicate the discrimination, so long as it has a " 'strong basis in evidence for its conclusion that remedial action was necessary.' " *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277); *Miller*, 1995 WL 382020, at *13, *14. Our point in noting the previous rulings of this court and the Supreme Court regarding the absence of polarized voting in Ohio was to emphasize that what was readily and reasonably apparent to and held by the courts, also should have been reasonably apparent to the Defendants—racially polarized voting generally does not exist in Ohio's legislative elections.[18]

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[18] We note, however, one exception. In *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), the district court held that the two House districts, 52 and 53, under the 1981 redistricting plan, which were located in Mahoning County, violated section 2 of the Voting Rights Act. The court found under a totality of the circumstances analysis that racially polarized voting existed in these two districts.

20. The Defendants contend that Tilling reasonably concluded that "racial bloc voting existed throughout Ohio." Defs.' Post Trial Br. at 62 & n. 45. Yet, the bivariate regression analysis of the Plaintiffs' expert, Dr. Henderson, for the election years 1990, 1986, and 1984, revealed the presence of coalitional voting in each of the eight districts where the Defendants, through Tilling, chose to engage in race-based redistricting in the 1992 plan. *See Quilter*, 1992 WL 677145, at *4 & n.2. The percentage of white cross-over vote in each of those districts was as follows: Rep. Mallory—50.66%; Rep. Rankin—50.93%; Rep. Miller—44.50%; Rep. Beatty—50.25%; Rep. McLin—35.44%; Rep. Roberts—45.98%; Rep. Sykes—48.76%; Rep. Jones—44.46%. *Id.* at *4 n.2. Prior to the time that the Defendants adopted "Amendment D," the 1992 plan, their own expert, Dr. King, analyzed over 200 elections throughout Ohio, and he concluded that a "degree of racially polarized voting existed in Ohio," but he was not willing to characterize the degree of racial polarization as "legally significant." Defs.' Post Trial Br. at 63 & n. 47. Regardless of Dr. King's ability to comment on the "legal" significance of his analyses, the fact remains that Dr. King did not challenge Dr. Henderson's results on this point. *See Quilter*, 1992 WL 677145, at *4 n.3. Dr. King's own results regarding polarized voting in Ohio revealed that on average 95% of blacks voted for black candidates and 56.7% of whites voted for black candidates, thereby confirming Dr. Henderson's results. *Id.* at *4 n.2. In the Apportionment Board's Findings and Conclusions, the Board even admitted the presence of white cross-over voting in the minority districts where race-based remedial measures were utilized. Bd. Findings ¶ 168. Given the overwhelming statistical evidence of coalitional voting in the challenged districts under the existing plan, and given the fact that the Defendants had this

information available to them before they adopted the 1992 plan, with its race-based remedial measures, we find that the Defendants could not reasonably conclude that the relevant minority group could establish a prima facie case of a violation of section 2 of the Voting Rights Act in the eight challenged districts. Significant evidence of white majority bloc voting in these Ohio legislative districts did not exist.

21. Because the Defendants did not possess a strong basis in evidence that they needed to engage in race-based redistricting to comply with section 2 of the Voting Rights, the Act does not provide a compelling state interest to justify the remedial action.[16] *See Miller*, 1995 WL 382020, at *13 ("As we sug-

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[16] The dissent concludes that the "State of Ohio . . . has the compelling state interest of complying with the Voting Rights Act." Dissenting Op. at [18]. As support for this holding, the dissent relies on the district court's decision in *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), where the court held that the two house districts, 52 and 53, located in Mahoning county under the 1981 redistricting plan violated section 2 of the Voting Rights Act, the Fifteenth Amendment to the United States Constitution, and section 7(C) of Article XI of the Ohio Constitution. The dissent implies that our instant finding that section 2 of Voting Rights Act did not constitute a compelling state interest to justify the Board's racial gerrymandering in the eight challenged House districts, is somehow inconsistent with the court's decision in *Armour*. In actuality, the two decisions present no conflict. The finding of racially polarized voting and a Voting Rights Act violation in one county of Ohio, does not necessarily mean that such evidence will be found in every county of Ohio. The House districts in Mahoning County under the 1992 plan were not even challenged in the instant case. To engage in race-based redistricting so as to remedy potential violations of section 2 of the Voting Rights Act, the Board must analyze the voting patterns in each district under the previous plan to determine if prima facie evidence of a section 2 violation exists. If such evidence does not exist in a given district, then the Board cannot engage in race-based redistricting in that district simply because a Voting Rights Act violation previously was found in another district in a different part of the State.

gested in *Shaw*, compliance with federal antidiscrimination law cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws."); *Hunt*, 861 F. Supp. at 440.

22. Because the Apportionment Board lacks a compelling state interest for its racial gerrymandering in House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan,[17] we conclude that these districts violate

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[17] In dissent, our colleague concludes that the Apportionment Board did have another compelling interest that justified its racial gerrymandering: compliance with Article XI of the Ohio Constitution, which contains Ohio's mandate to utilize traditional districting principles in the redistricting process. Dissenting Op. at [18]. Obviously, such a conclusion is based on the presumption that the Board adhered to the traditional districting principles in the Ohio Constitution when it drafted the 1992 plan. Although the dissent finds that the Board did comply with the districting principles in the Ohio Constitution, as we noted earlier the latter conclusion is a hotly contested matter, *see* Pls.' Post-Hr'g Br. at 36-49, on which we have previously chosen to abstain, *see Quilter*, 794 F. Supp. at 702. Because the Defendants, themselves, did not chose to proffer such a compelling justification for their racial gerrymandering, we again find it unnecessary to address the specific issue whether the Board complied with the traditional districting principles in the Ohio Constitution when it drafted the 1992 plan. Nevertheless, we offer two observations regarding the broader issue whether, assuming without holding that the Board did comply with the Ohio Constitution, such compliance could serve as a compelling state interest that would justify the Board's racial gerrymandering in the 1992 plan.

First, no previous court has held that a state's interest in complying with its own constitution provides a *compelling* justification to engage in racial gerrymandering. The dissent cites case law, which holds that states do have a legitimate interest in complying with the traditional districting principles embodied in their state constitutions. Dissenting Op. at [18]. No court, however, has ever held in the context of an equal protection challenge and in the face of direct evidence of racial gerrymandering that a state's interest in complying with its traditional districting principles provided compelling justification to engage in racial gerrymandering. Even

the Equal Protection Clause of the Fourteenth Amendment. Based on our holding, we find it unnec-

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the Defendants, themselves, do not make such a claim. To be sure, the Defendants argued that the Apportionment Board's compliance with Article XI of the Ohio Constitution indicated that it did not engage in racial gerrymandering and that strict scrutiny accordingly was not required. *See* Defs.' Trial Br. at 6-14, 61-64; Defs.' Post Trial Br. at 45-56. Nevertheless, even the Defendants realized that if this court determined that strict scrutiny was triggered by evidence of racial gerrymandering, the Defendants' only viable compelling interest sufficient to justify such race-based redistricting would be the Board's interest in complying with the mandates of section 2 of the Voting Rights Act. Thus, the Defendants relied solely on the Voting Rights Act as compelling justification for their race-base redistricting, once such a condition was determined, and did not even proffer compliance with the Ohio Constitution as a compelling justification. *See* Defs.' Post Trial Br. at 56-63.

Second, the dissent's conclusion defies logical reasoning. Without reiterating the Fourteenth Amendment's aversion toward race-base classifications, suffice it to say that our earlier analysis of Supreme Court precedent revealed that a state's purposeful use of race can only survive strict scrutiny if it is remedial in nature and substantially supported by evidence of past racial discrimination. *See Reno*, 113 S. Ct. at 2831 (citing *Croson*, 488 U.S. at 491-93; *Wygant*, 476 U.S. at 280-82). For example, in the context of our discussion of the Voting Rights Act as a compelling state interest, we noted that compliance with Voting Rights Act could serve as a compelling justification to engage in race-based redistricting so long as substantial evidence was present to indicate the need for such remedial action. *See supra* part II.D. Compliance with the Voting Rights Act, which was promulgated as a remedial measure for racial discrimination in the voting context, will clearly require that the apportioning entity purposefully consider race. Obviously, compliance with the traditional districting principles in the Ohio Constitution does not qualify as such a compelling interest. The Apportionment Board did not have to purposefully consider race so as to remedy past racial discrimination in order to comply with the traditional districting principles in the Ohio Constitution. The traditional districting principles in Article XI were clearly designed with the purpose of eliminating all forms of bias from the redistricting process. *See* Ohio Const. art. XI. Thus, to conclude that the Board's interest in complying with these principles justified their racial gerrymandering is logically unsustainable.

essary to discuss whether the 1992 plan was narrowly tailored to further a compelling state interest.

IV. Conclusion

The Fourteenth and Fifteenth Amendments to the United States Constitution, and the Voting Rights Act of 1965 have been major vehicles for the empowerment of black Americans long denied the full enjoyment of their political rights. Over the years, various schemes and artifices have been designed to serve as impediments to the attainment of citizenship status by minorities. As Jusice Frankfurter, however, wrote for the Supreme Court in *Lane v. Wilson*, 307 U.S. 268, 275 (1939), "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination." Without characterizing the nature of the discrimination present here, we simply hold that Justice Frankfurter's admonition is equally applicable to the Equal Protection Clause of the Fourteenth Amendment. Using race as the predominant factor to draw lines to concentrate black voters in discrete legislative districts with the reciprocal effect of siphoning off and reducing their influence in other districts, without legally cognizable justification, is incompatible with the Constitution, as now interpreted by the Supreme Court. Accordingly, we direct the State Defendants to redraft House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan to comply with the aforementioned principles.

In placing reliance on this court's and the Supreme Court's holdings that racial bloc voting generally had not occurred in Ohio's legislative elections, we make no judgment as to the state of racial progress in other aspects of race relations in Ohio. The fact that black voters, however, in the various legislative districts, as shown by the record in this case, coalesce with white voters in significant enough numbers to elect candidates of their choice, who happened to be black, demonstrates a high

degree of maturity. In our view, this degree of voter maturity represents the essence and ultimate objective of the Voting Rights Act and the Constitution.

IT IS SO ORDERED.

/s/ Nathaniel R. Jones
NATHANIEL R. JONES
U.S. Circuit Judge

/s/ Anthony J. Celebrezze, Sr.
ANTHONY J. CELEBREZZE, SR.
U.S. Circuit Judge

APPENDIX C

[Filed Aug. 11, 1995]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91 CV 2219

BARNEY QUILTER, *et al.*,
Plaintiffs,

vs.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

Judge Nathaniel R. Jones
Judge Anthony J. Celebrezze, Sr.
Judge David D. Dowd, Jr.

SUPPLEMENTAL DISSENTING OPINION

Dowd, J., dissenting.

On May 26, 1995, my colleagues vacated the majority opinion dated April 28, 1995 (Docket No. 322) and replaced it with a new majority opinion (Docket No. 327). In April, I had dissented (Docket No. 323). In May, I chose not to modify my original dissent, filing nothing in response to the "new" majority opinion which essentially added only comments on my dissent.

Now my colleagues have once again vacated their majority opinion and replaced it with an opinion that sub-

stantially changes the May 26, 1995 opinion, particularly by their deletion of the discussion relating to the "trigger" for strict scrutiny (i.e., the progeny of *Shaw v. Reno*, —— U.S. ——, 113 S.Ct. 2816 (1993)), and their insertion of a discussion of the recently decided *Miller v. Johnson*, —— U.S. ——, 115 S.Ct. 2475, 63 USLW 4726 (1995).[1]

At this juncture, I remain steadfast in my decision not to vacate my dissent of April 28, 1995, notwithstanding the fact that, given all the tinkering with the majority opinion, the dissent is no longer a very good "fit" for the majority opinion. One major reason for my decision not to vacate is that the dissent has already been submitted for review before the Supreme Court of the United States, as is evidenced by its placement in the Appendix to the Jurisdictional Statement filed with that Court.[2] What I said, I said. For the most part, as I did in May, I now feel no real compulsion to "correct" my dissent in light of the subsequent majority opinion which commented on it or in light of the latest majority opinion. Astute readers will accord my dissent whatever value it has and interpret it in light of the subsequent procedural (and substantive) posture of this case and developments in case law. I do, however, wish to set forth my view of the application of *Miller v. Johnson* to this case.[3]

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[1] *Miller v. Johnson* is also found on the WESTLAW electronic database at 1995 WL 382020. The majority opinion cites to this database. For consistency, this supplementary dissent will hereafter do the same.

[2] Both majority opinions have also been submitted as part of the jurisdictional statement.

[3] I also believe it is necessary to comment regarding the majority opinion's assessment of my prior discussion of the application of the Local Rules of the U.S. District Court for the Northern District of Ohio. I do so because of the importance of the latter issue to this District Court and its potential impact as this case is reviewed by the Supreme Court. Until very recently, I was the longtime Chairman of this District Court's Rules Committee. Therefore,

APPLICATION OF *MILLER v. JOHNSON*

In my April 28, 1995 dissent, I took the threshold position that the plaintiffs' *Shaw v. Reno* claim had no merit

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admittedly I am in a better position than my two colleagues to know, appreciate and apply the Local Rules of this District Court. Accordingly, I make this clarifying comment.

I have always opposed the majority's decision to grant plaintiffs leave to amend their complaint *after remand* to add an Equal Protection claim under *Shaw v. Reno*. In my dissent of April 28, 1995, I articulated my reasons, one of which was rooted in certain of the Local Rules of the U.S. District Court for the Northern District of Ohio. The majority, in both its May 26, 1995 opinion and the latest opinion, asserted that the Local Rules I cited have no application. This is not so.

The majority undoubtedly recognizes that, under 28 U.S.C. § 2284, this panel sits as a district court. Therefore, the Local Rules of the Northern District of Ohio apply, despite the fact that two of the panel judges are circuit court judges.

Prior to January 1, 1992, this District Court's Local Rules provided that a subsequently-filed civil case would be deemed related to a previously-filed civil case which "involve[d] the same issue or issues of fact or grows out of the same transaction or subject matter as a pending civil suit[.]" *See* Former Local Rule 7.09(4)(c). In such circumstances that local rule *required* that the later-filed case be assigned to the judge presiding over the earlier case so long as the earlier case was still pending.

The Judges of this District Court, acting under the authority of Fed. R. Civ. P. 83, determined over time that this "related case" rule was being used by litigants and attorneys to "judge shop." Therefore, the related case rule was abolished and replaced with the present local rule pursuant to which, even if a new case appears related to an existing case on another judge's docket, it cannot be shifted to the docket of the judge who drew the first case absent the consent of both judges. *See* Local Rules 1:2.4(2) and 6:2.5(c). Moreover, one judge cannot transfer an unrelated case on his or her docket to another judge without the approval of the Chief Judge of the District Court. *See* Local Rule 6:2.4. I first cited these local rules as part of the basis for my opposition to a post-remand amendment of the complaint.

The circuit judges making up the majority of this panel have stated in a footnote to their opinion that the rules do not apply

because the districts in question in this lawsuit, are not bizarrely shaped. *Miller v. Johnson*, however, has now made clear that "a threshold showing of bizarreness" is not required. 1995 WL 382020, at *9. To that extent, I must retract those portions of my dissent which discussed what I then thought was the threshold showing required for a *Shaw v. Reno* claim.

As noted by the majority, *Miller v. Johnson* clarified the burden of proof necessary to trigger strict scrutiny:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was *the predominant factor* motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature *subordinated traditional race-*

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in this instance because the plaintiffs did not file a *new lawsuit* alleging a *Shaw v. Reno* claim. The majority has missed the point. If the plaintiffs had, as they *should* have, filed a new lawsuit to assert their post-remand claim, the cited Local Rules of this District (presuming, of course, that the new case was filed in this district, as it could also have properly been filed in the Southern District of Ohio), would have operated to *prevent* them from placing their claim before this three-judge panel, a panel which they already knew was, in the majority, favorable to their viewpoint. Therefore, under the Local Rules of this District Court, the only way that the plaintiffs could assure a sympathetic ear was to obtain leave to amend the complaint.

The majority asserts that, while it may not have authority to "consider on remand the issues that the Supreme Court decided," it may "consider issues that have not been decided." There is a world of difference between considering issues that have not been previously *decided* and issues that have not been previously *raised*. The entire point is that, once a case has gone on appeal and back, if the plaintiffs have *new* claims against the defendants, they must file a new lawsuit. Failure to do so stretches Fed. R. Civ. P. 15, the remand rule, and the local rules of this District Court so far beyond their meanings as to completely destroy them. This is the ultimate in judge-shopping, the very abuse sought to be avoided by this District Court's Local Rules.

> *neutral districting principles*, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, *to racial considerations*. Where these or other race-neutral considerations are the basis for redistricting legislation and are not subordinated to race, a state can "defeat a claim that a district has been gerrymandered on racial lines."

1995 WL 382020, at *10 (citations omitted and emphases added).

Despite the clarity of this expression, the majority concludes that "there remains some ambiguity regarding the *Miller* 'predominant factor' test." The specific ambiguity relates to the meaning of the word "subordinated" in the test. The majority opines that "subordinated" could mean that, as compared to racial considerations, the legislature "disregarded or abandoned" traditional districting principles or that it merely "accorded [them] less emphasis or less weight[.]" The majority concludes that both interpretations are correct.

I do not disagree with the majority's ultimate conclusion that proof of either disregard and/or abandonment of traditional districting principles in favor of racial considerations *or* proof of diminished emphasis on traditional districting principles in favor of racial considerations is sufficient to establish a plaintiff's claim that race was the predominant factor upon which a given redistricting was based. I would only quarrel with the characterization of "the predominant factor test" as ambiguous. "Subordination" has a clear meaning: something is subordinated when it is placed in a lower order or class, or considered as having less value or importance. This, however, is only a minor point of divergence between my view and the majority's.

I find that the defendants adhered to traditional districting principles, which happen to be also contained in

the Ohio Constitution, in drawing the legislative districts in question *and* that they did not subordinate these principles to racial considerations. I would so hold notwithstanding the fact that, as I recognized in my dissent of April 28, 1995 at footnote 9, James R. Tilling's notes suggest that he purposefully considered race when drawing the districts. One can purposefully consider something without automatically subordinating all other factors also under consideration.[4] I find that the defendants considered race as they considered other factors, such as the districting principles set forth in the Ohio Constitution. Therefore, I would conclude that strict scrutiny is not required, a conclusion which would virtually end the analysis in my view.[5]

Even if strict scrutiny were required, I find for the reasons previously set forth in my April 28, 1995 dissent that the defendants had a compelling state interest. I will not repeat my analysis on this point. Suffice to say that, in my view, the defendants respected traditional districting principles while also giving race the considera-

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[4] In my April 28 dissent, I declined addressing at length the majority's discussion of the "trigger" for strict scrutiny, a discussion which has been deleted in the latest majority opinion in favor of the *Miller v. Johnson* discussion. On April 28, I simply presumed, because of (1) the references to race in Tilling's notes, (2) the importance of the rights at stake, and (3) the ambiguity regarding the appropriate "trigger," that strict scrutiny should apply. Now that the Supreme Court has clarified that the "trigger" is "race-the-predominant-factor," I want to clearly state that I would not find Tilling's notes sufficient to prove that race was *the predominant* factor considered. My present position is not inconsistent with my April 28 dissent because there I simply took the view for the sake of discussion "that caution requires strict scrutiny." (April 28, 1995 Dissent, at 17). Following *Miller*, the test is clear and the need for caution on this matter is gone.

[5] If strict scrutiny is not the standard of review, then rational basis applies. It would be extremely difficult, if not impossible, to conclude that the defendants had no rational basis for the district lines they drew.

tion it was due in light of the Voting Rights Act and *Armour v. State of Ohio*, 775 F.Supp. 1044 (N.D. Ohio 1991). Balancing *all* of these considerations led to a redistricting plan narrowly tailored to meet a compelling state interest, thus withstanding strict scrutiny.

The redistricting plan that is the subject of this lawsuit involves a legislature with 99 House Districts which must be configured in compliance with the Ohio Constitution. Of these 99, only eight have been challenged here. These eight discrete districts take in counties which are entitled to more than one legislator each, a fact which required the Apportionment Board to make decisions as to how to split the counties. Given the several constraints placed on the Apportionment Board, i.e., the Voting Rights Act, the Fourteenth Amendment, *Armour v. State of Ohio*, in addition to the Ohio Constitution, this Court must take to heart the admonition of the *Miller* Court that:

> [t]he distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise *extraordinary caution* in adjudicating claims that a state has drawn district lines on the basis of race.

Miller v. Johnson, 1995 WL 382020, at *10 (emphasis added). In my view, the majority has failed to exercise the requisite caution.

CONCLUSION

For the reasons expressed in my April 28, 1995 dissent, as supplemented and modified herein, I respectfully dissent.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX D

[Filed Aug. 11, 1995]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5: 91CV-2219

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

Judge Nathaniel R. Jones
Judge Anthony J. Celebrezze, Sr.
Judge David D. Dowd, Jr.

JUDGMENT

Because race was the predominant motivating factor in the State Apportionment Board's creation of House districts 21, 22, 30, 31, 38, 39, 44, and 49 in the 1992 reapportionment plan ("Amendment D") and because the Board lacks a compelling state interest for its racial gerrymandering, we conclude that the aforementioned House districts violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Thus, we hereby enter judgment in favor of the Plaintiffs and order the Defendants George V. Voinovich, Stanley J. Aronoff, and Robert A. Taft II in their official capacity as members of the State Apportionment Board

to redraft House districts 21, 22, 30, 31, 38, 39, 44, and 49 in the 1992 plan to comply with the principles delineated in the Opinion, filed contemporaneously with this judgment. We also order that the redrafting be completed by November 1, 1995.

Because Plaintiffs are the prevailing party in this matter, we find that they are entitled to costs, including reasonable attorneys' fees pursuant to 42 U.S.C. §§ 1988 and 1973*l*(e).

IT IS SO ORDERED.

/s/ Nathaniel R. Jones
NATHANIEL R. JONES
U.S. Circuit Judge

/s/ Anthony J. Celebrezze, Sr.
ANTHONY J. CELEBREZZE, SR.
U.S. Circuit Judge

DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX E

[Filed Aug. 17, 1995]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5: 91CV-2219

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

Judge Nathaniel R. Jones
Judge Anthony J. Celebrezze, Sr.
Judge David D. Dowd, Jr.

MEMORANDUM AND OPINION

Before this court is Defendants' Motion for Stay Pending Appeal (Docket No. 336). On August 11, 1995, this court found that eight House districts in the 1992 Apportionment plan ("Amendment D") violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and ordered Defendants to redraft the districts by November 1, 1995. Maj. Op. at [38-40] (Docket No. 342). Defendants seek a stay of this court's Order pending appeal, pursuant to Federal

Rule of Civil Procedure 62(c). For the following reasons, the motion is denied.[1]

To obtain the relief provided for in Rule 62(c), the moving party carries the burden of satisfying a well recognized four-part test. The four factors are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Michigan Coalition of Radioactive Material Users v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

A. Likelihood of Success on the Merits

Defendants first claim they are likely to succeed on their appeal of our earlier decision, *Quilter v. Voinovich*, 157 F.R.D. 36 (N.D. Ohio 1994), which permitted Plaintiffs to amend their complaint to add a *Shaw v. Reno* claim.

In *Quilter v. Voinovich*, the Supreme Court held that the Plaintiffs had established a *prima facie* case that the population deviations between the districts violated the Equal Protection Clause, and the court remanded "only for further proceedings on whether the plan's deviation from equal populations among districts violate[d] the Fourteenth Amendment." *Voinovich v. Quilter*, 113 S. Ct. 1149, 1154 (1993).

Several months after its *Voinovich* decision, the Court decided *Shaw v. Reno*, 113 S. Ct. 2816 (1993). *Shaw*

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[1] Defendants filed their motion to stay in response to our Opinion dated May 26, 1995 (Docket No. 327). On August 11, 1995, we vacated the May 26, 1995 Opinion and filed a new Opinion (Docket No. 342). Because our most recent decision achieves the same result as our previously vacated decision and due to the time constraints inherent in the issue before this court, we will treat the Defendants' Motion for Stay as applicable to our new decision.

held for the first time that a plaintiff can state a claim under the Equal Protection Clause by alleging that a districting plan reflects "an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification." *Id.* at 2832. In their initial submissions to this court on remand, the parties discussed *Shaw*'s applicability to this case, and in a December 22, 1993 Order, we requested that the parties comment further on the applicability of *Shaw*. At that time, Plaintiffs moved this court to amend their compalint and plead the *Shaw* issue, which we granted. *See Quilter v. Voinovich*, 157 F.R.D. 36 (N.D. Ohio 1994). Defendants argue that this court violated the mandate rule and abused its discretion in allowing the amendment and that they will prevail regarding this issue on appeal.

It is established law that "[w]hile a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (quotation omitted) (citing *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939)); *see Jones v. Lewis*, 957 F.2d 260, 262 (6th Cir.) (under the "mandate rule," a district court on remand "may consider those issues not decided expressly or impliedly by the appellate court or a previous trial court."), *cert. denied*, 113 S. Ct. 125 (1992).

Under the mandate rule, we may not reconsider the issues decided by the Supreme Court. This is the relevant point made by the cases, cited by the Defendants, which hold that "an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennsylvania R.R. Co.*, 334 U.S. 304, 306 (1948). Nevertheless, the case law indicates that this court is permitted to consider issues that have not been decided. In this case, the Court expressly abstained from passing upon the type of Equal Protection Clause issue discussed in *Shaw*, because Plaintiffs did not plead it nor did this court reach it in its earlier decision:

> Appellees' complaint does not allege that the State's conscious use of race in redistricting violates the Equal Protection Clause; the District Court below did not address the issue; and neither party raises it here. Accordingly, we express no view on how such a claim might be evaluated.

113 S. Ct. at 1157. Thus, the Court's mandate did not prohibit us from considering that issue on remand.

The Defendants stress that at one point in its opinion, the Court stated that it was remanding "only" for further proceedings on the population deviation issue. *Id.* at 1154. This statement, which comes at the end of the opinion's introductory section in which the Court summarizes the facts of the case, appears to indicate simply that the Court is remanding only the population claim and not the Voting Rights Act or Fifteenth Amendment ones. Though it is presumably within the Court's power to order us not to consider any other issues, this one-time use of the word "only" does not demonstrate that it meant to do so.

Furthermore, Federal Rule of Civil Procedure 15(b) allows an amendment of pleadings that is necessary to cause them to conform to the issues that have been tried. The Rule instructs that a court "shall [allow an amendment] freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits." [2]

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[2] Rule 15(b) provides:

> (b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but

The *Shaw* claim was closely linked to the earlier proceedings, such that the relevant facts had already been developed and the issues were in part explored in the earlier hearing. Also, the contours of the cause of action established in *Shaw* were unclear until the issuance of the opinion in that case, so it would be unfair to expect the Plaintiffs to have specifically articulated the issue earlier. The Plaintiffs surely would have raised the *Shaw* claim in an earlier pleading if *Shaw* had been decided earlier. For these reasons, we are not persuaded that Defendants will prevail regarding this issue on appeal.

Defendants also argue they will succeed on the merits of their claim challenging this court's use of strict scrutiny in evaluating the 1992 Apportionment plan. Under the Supreme Court's interpretation of *Shaw* in *Miller v. Johnson*, Nos. 94-631/797/929, 1995 WL 382020, the Defendants' predominant reliance on race in drafting the 1992 plan triggered strict scrutiny. According to *Miller*:

> [P]laintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to the legislative purpose, that race was the *predominant factor* motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for politi-

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failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

> cal subdivisions or communities defined by actual shared interests, to racial considerations.

1995 WL 382020, at *10 (citations omitted and emphasis added). Based on our thorough review and consideration of all the evidence presented in this case, we found that race was the predominant motivating factor in the Defendants' creation of House districts 21, 22, 30, 31, 38, 39, 44, and 49 in the 1992 plan because traditional districting principles were subordinated to or given less weight in the reapportionment process than racial considerations. These House districts were the result of racial gerrymandering. Although none of the districts presented a bizarre shape, both direct evidence from trial testimony and the Apportionment Board's Findings and Conclusions, and circumstantial evidence from Tilling's notes and the accompanying maps, clearly revealed that the Defendants intentionally crafted these eight districts with the predominant purpose of separating voters on the basis of race. Because race was the predominant motivating factor in the drafting of these eight districts in the 1992 plan, they had to be subjected to strict scrutiny in accordance with the Court's analysis in *Miller*, 1995 WL 382020, at *13.

Defendants also contend that they will succeed on the merits because even if strict scrutiny is applied to the 1992 plan, their use of race in the resulting districts was narrowly tailored to satisfy a compelling state interest. The Defendants proffer that compliance with section 2 of the Voting Rights Act was the compelling state interest that justified their race-based redistricting. Defs.' Mem. in Support at 12-15.

In order to show, however, that section 2 of the Voting Rights Act is a compelling state interest, Defendants must have a strong basis in evidence that race-based redistricting was necessary as a remedial measure to comply with the Voting Rights Act. Both this court and the Supreme Court previously held on the basis of all

the evidence, that racially polarized voting generally did not exist in Ohio's legislative elections. *Quilter*, 113 S. Ct. at 1158; *see also Quilter*, 1992 WL 677145, at *4 & n.2, n.3, *8 (holding that Ohio has coalitional voting, where whites cross over and vote for black candidates, and not polarized voting, where whites vote for white candidates and blacks vote for black candidates). Because the Defendants lacked evidence that any party could mount a *prima facie*, section 2 challenge to the eight districts in question, Defendants' reliance on section 2 of the Voting Rights Act as a compelling state interest to justify their racial gerrymandering in the 1992 plan is unavailing.

Therefore, Defendants have not satisfied their burden of proving that they are likely to succeed on the merits of their claims on appeal.

B. Irreparable Injury to the Defendants

Defendants contend that absent a stay, they will be injured irreparably because they will be deprived of meaningful review of their claim on appeal. Defendants claim that redrafting the districts before the next election may moot the issue of whether this court acted properly in ordering the Defendant to redraft the districts. Simply redrawing the eight challenged districts by November 1, 1995, however, will not moot Defendants' appeal.

Instead, assuming that the Supreme Court agrees to review the case on the merits, we find that requiring the Defendants to redraft the eight districts now, ensures that both the new plan and the 1992 plan will be available for immediate implementation once the Court renders its decision.

On the other hand, if this court's decision is stayed, and the Defendants lose on appeal, Ohio's 1996 primary elections would undoubtedly have to be postponed until such time as the Defendants redrafted the eight districts. Thus,

requiring the Defendants to redraft the eight districts by November 1, 1995, will result in less interference with the upcoming state elections. Defendants may be inconvenienced by the remedy, but they will not be harmed irreparably.

C. Harm to Plaintiffs

With respect to the third prong of the test, Defendants assert other parties will not be harmed by the requested stay because the Court can adequately protect their interests by ordering the Board to reconfigure the eight districts if Defendants are successful on appeal. Defendants contend that the effect of the stay will not prohibit Plaintiffs from effectively participating the upcoming 1996 elections. Defs.' Mem. in Support at 17.

As previously noted, Defendants' attempt to delay the redrafting of the districts until after the Supreme Court resolves their appeal on the merits could entirely disrupt the election calendar. If the Defendants are allowed to delay drawing the new districts until after they lose on appeal, Defendants certainly will not have the new districts in place by the January 19, 1996 registration deadline for the March 19, 1996 state primary. Candidates would be placed in the position of filing without knowing their constituencies. Even worse is the possibility the primary election would have to be postponed while the Defendants take at least a month or two to draft the new districts.

If the stay is denied, however, Defendants will have both the 1992 plan and the newly drafted districts available for immediate implementation. Thus, regardless of the outcome of Defendants' appeal, Defendants would be able to institute the appropriate districts in more expedient fashion after the Court renders its decision, and the Plaintiffs would suffer less harm.

D. Harm to the Public Interest

Finally, Defendants argue that without the stay, until the appeal to the Supreme Court is resolved, the state electorate will be left "in limbo" concerning the district in which they will vote in the 1996 Ohio General Assembly elections. They allege that candidates and voters alike will be "in a state of confusion and potential chaos." Defs.' Mem. in Support at 18.

We are convinced, however, that the public would suffer more harm by continuing the Defendants' promotion of racial stereotypes than by implementing constitutional voting districts. As the Supreme Court stated in *Miller*:

> When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, "think alike, share the same political interests, and will prefer the same candidates at the polls." Race-based assignments "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution."

1995 WL 382020, at *7 (citations omitted). Voters in the eight, racially-gerrymandered districts have already been forced to vote in two state elections since the implementation of the 1992 plan. Allowing another to proceed under the 1992 plan will occasion the greatest harm of all.

For the foregoing reasons, Defendants' Motion for a Stay Pending Appeal is DENIED.

IT IS SO ORDERED.

/s/ Nathaniel R. Jones
NATHANIEL R. JONES
U.S. Circuit Judge

/s/ Anthony J. Celebrezze, Sr.
ANTHONY J. CELEBREZZE, SR.
U.S. Circuit Judge

DAVID D. DOWD, JR.
U.S. Circuit Judge

APPENDIX F

[Filed Aug. 17, 1995]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91CV-2219

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

Judge Nathaniel R. Jones
Judge David D. Dowd, Jr.

NOTICE OF APPEAL

Notice is hereby given that George V. Voinovich, Robert A. Taft II, Stanley J. Aronoff, and James R. Tilling, Defendants in the above-captioned action, hereby appeal to the Supreme Court of the United States from the following orders issued by this Court on August 11, 1995:

1) ORDER, docket number 341;

2) OPINION, docket number 342;

3) SUPPLEMENTAL DISSENTING OPINION, docket number 343; and

4) JUDGMENT, docket number 344.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

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APPENDIX G

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have

engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. § 1253. Direct appeals from decisions of three judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 2284. Three-judge court; when required; composition; procedure

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any state-wide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by

the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

OHIO CONSTITUTION ARTICLE XI: APPORTIONMENT

§ 1 [Persons responsible for apportionment of state for members of general assembly.]

The governor, auditor of state, secretary of state, one person chosen by the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the general assembly.

Such persons, or a majority of their number, shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine house of representative districts and thirty-three senate districts. Such meeting shall convene on a date designated by the governor between August 1 and October 1 in the year one thousand nine hundred seventy-one and every tenth year thereafter. The governor shall give such persons two weeks advance notice of the date, time, and place of such meeting.

The governor shall cause the apportionment to be published no later than October 5 of the year in which it is made, in such manner as provided by law. (Enacted Nov. 7, 1967. Former § 1 repealed, see SJR 24, 107th General Assembly.)

§ 2 [Method of apportionment of state for members of general assembly.]

The apportionment of this state for members of the general assembly shall be made in the following manner: The whole population of the state, as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be

divided by the number "ninety-nine" and the quotient shall be the ratio of representation in the house of representatives for ten years next succeeding such apportionment. The whole population of the state as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "thirty-three" and the quotient shall be the ratio of representation in the senate for ten years next succeeding such apportionment. (Enacted Nov. 7, 1967. Former § 2 repealed, see SJR 24, 107th General Assembly.)

§ 3 [Population of each house of representatives district.]

The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, as provided in section 2 of this Article, and in no event shall any house of representatives district contain a population of less than ninety-five percent nor more than one hundred five per cent of the ratio of representation in the house of representatives, except in those instances where reasonable effort is made to avoid dividing a county in accordance with section 9 of this Article. (Enacted Nov. 7, 1967. Former § 3 repealed, see SJR 24, 107th General Assembly.)

§ 4 [Population of each senate district.]

The population of each senate district shall be substantially equal to the ratio of representation in the senate, as provided in section 2 of this Article, and in no event shall any senate district contain a population of less than ninety-five percent nor more than one hundred five per cent of the ratio of representation in the senate as determined pursuant to this Article. (As enacted Nov. 7, 1967. Former § 4 repealed, see SJR 24, 107th General Assembly).

§ 5 [Representation.]

Each house of representatives district shall be entitled to a single representative in each General Assembly. Every senate district shall be entitled to a single senator in each General Assembly. (As enacted Nov. 7, 1967. Former § 5 repealed, see SJR 24, 107th General Assembly.)

§ 6 [Creation of district boundaries; change at end of decennial period.]

District boundaries established pursuant to this Article shall not be changed until the ensuing federal decennial census and the ensuing apportionment or as provided in section 13 of this Article, notwithstanding the fact that boundaries of political subdivisions or city wards within the district may be changed during that time. District boundaries shall be created by using the boundaries of political subdivisions and city wards as they exist at the time of the federal decennial census on which the apportionment is based, or such other basis as the general assembly has directed. (As enacted Nov. 7, 1967. Former § 6 repealed, see SJR 24, 107th General Assembly.)

§ 7 [Boundary lines of house of representatives districts.]

(A) Every house of representatives district shall be compact and composed of contiguous territory, and the boundary of each district shall be a single nonintersecting continuous line. To the extent consistent with the requirements of section 3 of this Article, the boundary lines of districts shall be so drawn as to delineate an area containing one or more whole counties.

(B) Where the requirements of section 3 of this Article cannot feasibly be attained by forming a district from a whole county or counties, such district shall be formed by combining the areas of governmental units giving preference in the order named to counties, townships, municipalities, and city wards.

(C) Where the requirements of section 3 of this Article cannot feasibly be attained by combining the areas of governmental units as prescribed in division (B) of this section, only one such unit may be divided between two districts, giving preference in the selection of a unit for division to a township, a city ward, a city, and a village in the order named.

(D) In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted to the extent reasonably consistent with the requirements of section 3 of this Article. (As enacted Nov. 7, 1967. Former § 7 repealed, see SJR 24, 107th General Assembly.)

§ 8 [Determination of number of house of representatives districts within each county.]

A county having at least one house of representatives ratio of representation shall have as many house of representatives districts wholly within the boundaries of the county as it has whole ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining house of representatives district.

The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation for the house of representatives determined under section 2 of this Article. (As enacted Nov. 7, 1967. Former § 8 repealed, see SJR 24, 107th General Assembly.)

§ 9 [When population of county is fraction of ratio of representation.]

In those instances where the population of a county is not less than ninety per cent nor more than one hundred ten per cent of the ratio of representation in the house of representatives, reasonable effort shall be made to

create a house of representatives district consisting of the whole county. (As enacted Nov. 7, 1967. Former § 9 repealed, see SJR 24, 107th General Assembly.)

§ 10 [Creation and numbering of house of representative districts.]

The standards prescribed in sections 3, 7, 8 and 9 of this Article shall govern the establishment of house of representatives districts, which shall be created and numbered in the following order to the extent that such order is consistent with the foregoing standards:

(A) Each county containing population substantially equal to one ratio of representation in the house of representatives, as provided in section 2 of this Article, but in no event less than ninety-five per cent of the ratio nor more than one hundred five per cent of the ratio shall be designated a representative district.

(B) Each county containing population between ninety and ninety-five per cent of the ratio or between one hundred five and one hundred ten per cent of the ratio may be designated a representative district.

(C) Proceeding in succession from the largest to the smallest, each remaining county containing more than one whole ratio of representation shall be divided into house of representatives districts. Any remaining territory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county.

(D) The remaining territory of the state shall be combined into representative districts. (As enacted Nov. 7, 1967. Former § 10 repealed, see SJR 24, 107th General Assembly.)

§ 11 [Senate districts.]

Senate districts shall be composed of three contiguous house of representatives districts. A county having at least one whole senate ratio of representation shall have as many senate districts wholly within the boundaries of the county as it has whole senate ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining senate district. Counties having less than one senate ratio of representation, but at least one house of representatives ratio of representation shall be part of only one senate district.

The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation in the senate determined under section 2 of this Article.

Senate districts shall be numbered from one through thirty-three and as provided in section 12 of this Article. (As enacted Nov. 7, 1967. Former § 11 repealed, see SJR 24, 107th General Assembly.)

§ 12 [Change in boundaries of senate districts.]

At any time the boundaries of senate districts are changed in any plan of apportionment made pursuant to any provision of this Article, a senator whose term will not expire within two years of the time the plan of apportionment is made shall represent, for the remainder of the term for which he was elected, the senate district which contains the largest portion of the population of the district from which he was elected, and the district shall be given the number of the district from which the senator was elected. If more than one senator whose term will not so expire would represent the same district by following the provisions of this section, the persons responsible for apportionment, by a majority of their number, shall designate which senator shall represent the district and shall designate which district the other senator or sen-

ators shall represent for the balance of their term or terms. (As enacted Nov. 7, 1967, see SJR 24, 107th General Assembly. Former § 12 repealed May 7, 1968, HJR 42.)

§ 13 [Jurisdiction of supreme court, effect of determination of unconstitutionality; apportionment.]

The supreme court of Ohio shall have exclusive, original jurisdiction in all cases arising under this Article. In the event that any action of this Constitution relating to apportionment or any plan of apportionment made by the persons responsible for apportionment, by a majority of their number, is determined to be invalid by either the supreme court of Ohio, or the supreme court of the United States, then notwithstanding any other provisions of this Constitution, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment in conformity with such provisions of this Constitution as are then valid, including establishing terms of office and election of members of the general assembly from districts designated in the plan, to be used until the next regular apportionment in conformity with such provisions of this Constitution as are then valid.

Notwithstanding any provision of this Constitution or any law regarding the residence of senators and representatives, a plan of apportionment made pursuant to this section shall allow thirty days for persons to change residence in order to be eligible for election.

The governor shall give the persons responsible for apportionment two weeks advance written notice of the date, time, and place of any meeting held pursuant to this section. (As enacted Nov. 7, 1967, see SJR 24, 107th General Assembly. Former § 13 repealed May 7, 1968, HJR 42.)

§ 14 [District boundaries until January 1, 1973.]

The boundaries of house of representatives districts and senate districts from which representatives and senators were elected to the 107th general assembly shall be the boundaries of house of representatives and senate districts until January 1, 1973, and representatives and senators elected in the general election in 1966 shall hold office for the terms to which they were elected. In the event all or any part of this apportionment plan is held invalid prior to the general election in the year 1970, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment to be effective until January 1, 1973, in accordance with section 13 of this Article. (As enacted Nov. 7, 1967, see SJR 24, 107th General Assembly.)

§ 15 [Severability provision.]

The various provisions of this Article XI are intended to be severable, and the invalidity of one or more of such provisions shall not affect the validity of the remaining provisions. (As enacted Nov. 7, 1967, see SJR 24, 107th General Assembly.)

Supreme Court, U.S.
FILED
SEP 18 1995
CLERK

No. 95-378

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellants,

v.

BARNEY QUILTER, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

---

MOTION TO DISMISS APPEAL AND TO AFFIRM RULING OF TRIAL COURT

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QUESTIONS PRESENTED

1. Did this Court, in remanding this case to the District Court, intend to circumscribe the District Court's inherent discretion to allow Appellees to amend their complaint to challenge Appellants' admitted use of race in drawing district lines as a conscious attempt to separate voters by race pursuant to *Shaw v. Reno*, 113 S. Ct. 2816 (1993)?

2. Where Appellees have suffered a cognizable injury as a result of residing in districts that admittedly were drawn on the basis of race, do Appellees have standing to challenge Appellants' apportionment plan in its entirety?

3. Where the Appellant majority members of the Apportionment Board have abdicated their responsibility to the electorate of Ohio to create a lawful redistricting plan, do Appellees, as dissenting members of the Board, have standing to challenge Appellants' plan in its entirety?

4. Can Appellants divest the District Court of jurisdiction to amend its Opinion following trial by purporting to file a notice of appeal even though the District Court has not decided upon a remedy or entered a final judgment?

5. Can Appellants, by using racial considerations as their predominant motivating factor in drawing district lines, "subordinate" traditional districting principles to racial considerations under *Miller v. Johnson*, 115 S. Ct. 2475 (1995)?

6. Where there is overwhelming direct evidence that Appellants were motivated predominantly by race in drawing district lines, does *Miller v. Johnson*, 115 S. Ct. 2475 (1995), require that the District Court find that Appellants' apportionment plan violates the Ohio Constitution as a predicate to finding that Appellants gave less weight to traditional districting principles than to racial considerations?

7. Does Appellants' unfounded fear of a legal challenge to their reapportionment plan under the Voting Rights Act constitute a compelling state interest justifying Appellants' admitted use of race in drawing district lines in a state with no significant racial bloc voting for legislators? *

---

* Appellees' Questions 1, 2, 3 and 7 are identical to Questions 1, 2, 3 and 5, respectively, set forth in Appellees' Motion to Dismiss and to Affirm Ruling of Trial Court filed August 25, 1995 in response to Appellants' Jurisdictional Statement prematurely filed on July 24, 1995. Appellants' first Jurisdictional Statement was filed before the District Court had selected a remedy and entered judgment, and purported to appeal opinions that were vacated by the District Court. Accordingly, this Court should not consider Appellants' July 24, 1995 Jurisdictional Statement; however, if this Court considers the Questions and arguments set forth in Appellants' earlier Jurisdictional Statement, then Appellees request that this Court also consider the additional Questions and arguments in Appellees' August 25, 1995 Motion to Dismiss and to Affirm Ruling of Trial Court.

LISTING OF ADDITIONAL PARTIES

Appellants

STANLEY J. ARONOFF, President of the Ohio Senate, ROBERT A. TAFT, II, Secretary of State of Ohio, and JAMES R. TILLING, Secretary to the Apportioning Persons.

Appellees

THOMAS R. FERGUSON, GLEN ACHTERMANN, SAM BARONE, SANDRA GUY, ROBERT McLAUGHLIN, JAMES B. McCARTHY, GLADYS HENSON, TOM KILBANE, ROBERT H. TRAINER, A. WAYNE BUSSLER, JAMES B. SPEROS, KENNETH THORNE, CHARLES WALKER, WILLIAM SHANKLIN, TYRONE RILEY, RICHARD CORDRAY, PAUL MECHLING, RONALD GERBERRY, Representative of the 65th Ohio House District, MARY ABEL, Representative of the 78th Ohio House District, and WILLIAM MALLORY.

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RULE

Supreme Court Rule 18.1 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-378

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellants,

v.

BARNEY QUILTER, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

---

MOTION TO DISMISS APPEAL AND TO AFFIRM RULING OF TRIAL COURT

OPINIONS BELOW

The August 11, 1995 Order of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix at App. 1a.

The August 11, 1995 Opinion of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix at App. 3a.

The August 11, 1995 Supplemental Dissenting Opinion of Judge Dowd has not been officially reported. It is set forth in Appellants' Appendix at App. 46a.

The August 11, 1995 Judgment of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix at App. 53a.

The August 17, 1995 Memorandum and Opinion of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix at App. 55a.[1]

JURISDICTION

The Orders appealed from were filed on August 11, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1253.

---

[1] The following orders and opinions of the three-judge District Court were addressed in Appellants' premature Jurisdictional Statement filed on July 24, 1995 and designated No. 95-132:

The April 28, 1995 Opinion of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix in No. 95-132 ("App. (95-132)") at App. (95-132) 1a.

The May 9, 1995 Order of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix at App. (95-132) 81a.

The May 26, 1995 Opinion of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix at App. (95-132) 82a.

The March 31, 1994 Opinions and Orders of the three-judge District Court have been officially reported at 857 F. Supp. 579 and 157 F.R.D. 36, and also are set forth in Appellants' Appendix at App. (95-132) 128a and 145a.

The May 26, 1995 Order Vacating Memorandum Opinion (D. 322) and Vacating Order Regarding Admission of Trial Exhibits (D. 320) of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix at App. (95-132) 153a.

The June 23, 1995 Order of Chief Judge Merritt of the United States Court of Appeals for the Sixth Circuit has not been officially reported. It is set forth in Appellants' Appendix at App. (95-132) 155a.

In addition, other opinions and orders in this case include *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993); *Quilter v. Voinovich*, 794 F. Supp. 695 (N.D. Ohio 1992); *Quilter v. Voinovich*, 1992 WL 677145 (N.D. Ohio Mar. 19, 1992); *Quilter v. Voinovich*, 794 F. Supp. 760 (N.D. Ohio 1992).

STATEMENT OF THE CASE

In Ohio, unlike many other states, the authority to reapportion following a decennial census is conferred upon an Apportionment Board (the "Board"), which acts within narrowly confined limits set by the Ohio Constitution. Ohio Constitution, Article XI. The 1991 Board consisted of Appellants George V. Voinovich, Governor of the State of Ohio, Robert A. Taft II, Secretary of State of Ohio, Stanley J. Aronoff, President of the Ohio Senate, and Appellees Thomas E. Ferguson, then Auditor of the State of Ohio and Barney Quilter, then Speaker *Pro Tempore* of the Ohio House of Representatives.[2] The majority members of the Board appointed James R. Tilling ("Tilling") as its Secretary; Tilling's primary function was to create a plan of apportionment.

As part of the apportionment process, the Board adopted as its standard the conscious separation of voters by race in order to guarantee the election or re-election of black legislators. Throughout the apportionment process, Tilling and the majority Board members labored under the impression that they were required by federal law to create as many majority-minority districts as possible. In its initial findings of fact, the District Court found that it "addressed an Apportionment Board that applied a rule mandating the creation of majority-minority districts wherever possible. The Board did not purport to devise this rule based upon Ohio policy and law; rather, it contended that such a per se rule is mandated by federal law." *Quilter v. Voinovich*, 1992 WL 677145 (N.D. Ohio Mar. 19, 1992). This Court concurred in the District Court's finding that district lines in Ohio were drawn on the basis of race. *Voinovich v. Quilter*, 113 S. Ct. 1149, 1155-56 (1993).

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[2] Board members Voinovich, Taft and Aronoff constitute the majority Board members; Board members Ferguson and Quilter are the dissenting Board members.

Tilling consistently and repeatedly stated the Board's primary intention to draw district lines on the basis of race. At a public hearing held in Toledo, Ohio on August 26, 1991, Tilling stated that "[t]he courts have said wherever you can create a majority-minority district, you must do so, it's just that simple." D. 348, Ex. 19 at 8. The next day, August 27, 1991, Tilling stated at a public hearing in Columbus, Ohio that "it is the firm commitment of the Apportionment Board to adhere to the Supreme Court guidelines in creating the maximum number of minority districts possible in the State of Ohio. . . . [W]e are under a mandate that wherever a majority minority district can be created, that must be done. It is beyond the realm of discussion." D. 348, Ex. 20 at 12. Similarly, Tilling stated at a public hearing in Cleveland, Ohio on August 28, 1991, that his view was "where a majority-minority district can be created, they must be created. It's just that simple." D. 348, Ex. 21 at 6.

These were not isolated statements; Tilling declared at other public meetings that the Board's primary intention was to create majority-minority districts—a goal that requires attention to racial considerations, not traditional districting principles. For example, in Mansfield, Ohio Tilling stated on August 28, 1991 that "the criteria we're operating under is where a minority district can be created, we are under an obligation to do that." D. 348, Ex. 22 at 5. In Dayton, Ohio on August 29, 1991, Tilling said that "[w]here [the creation of a majority-minority district] can be done, the [Supreme] Court is mandating decision-makers to do that." D. 348, Ex. 23 at 8. At a public hearing in Cambridge, Ohio on September 3, 1991, Tilling declared that "[t]he next thing we have to do really is not in the Ohio Constitution at all, . . . [W]e've got to do everything in our power not to diminish the number of minority districts that are present. And if possible, if there is a way to increase those, we have to try to find that." D. 348, Ex. 25 at 13. On that same day, Tilling stated in Athens, Ohio that "[t]he [Supreme] Court

basically is operating under a very strict standard and is making it clear to those of us around the country that are drawing new lines that the operating principle they were looking for is did the map makers do everything possible to protect existing minority districts, and where possible did they draw lines in such a way to increase minority influence in the general assembly?" D. 348, Ex. 24 at 6-7.

In Charden, Ohio on September 5, 1991, Tilling reiterated the Board's view that it was "under an obligation to not dilute minority voting strengths and in fact, where possible, [it was] instructed to try and increase minority voting strength." D. 348, Ex. 27 at 10. Also on September 5, 1991, Tilling stated in Strongsville, Ohio that "the court directive that we are bound to follow is that there can be no deletion [*sic*] of minority voting strength." D. 349, Ex. 28 at 8. On September 7, 1991, Tilling stated in Columbus, Ohio that "the number of minority districts must be maintained and where possible, they must be increased, and that's very simple; doesn't take a genius to figure it out. It's black and white." D. 349, Ex. 29 at 11.

The evidence that Tilling carried out the Board's policy of basing voting districts primarily upon racial considerations is overwhelming. Tilling's handwritten notes and maps, D. 154, Ex. 120, contain substantial direct evidence of race-based line drawing. Tilling's notes prove that Tilling began the redistricting process by displaying the minority populations of each urban county on his computer screen and drawing "minority districts" first, before attempting to ascertain which pre-existing districts could have been retained as required by Ohio Constitution, Article XI, § 7(D). D. 154, Ex. 120. For example, Tilling's notes state, with respect to Franklin County, "[a]void primarily white Bexley and Whitehall." *Id.* In Hamilton County, Tilling's notes confirm the Board's intention to "start with majority-minority districts, begin around the downtown area and configure a district including the greatest portion of the eastern segment of

black population, mostly City of Cincinnati." *Id.* at 4. As reflected in Tilling's notes regarding Summit County, the Board's intent was to "try to maximize the minority voters in [Vernon Sykes'] district." *Id.* at 6. At the Apportionment Board hearing, held on September 30, 1991, the Board stated that "[w]e subscribe to the interpretation of the Voting Rights Act that says that it is the obligation of draftsmen to create a majority minority district where possible." D. 349, Ex. 31 at 106.

Substantial additional evidence that the Board primarily was motivated by racial considerations in drawing district lines is set forth in the Board's Findings of Fact and Conclusions of Law ("Board Findings"), adopted by the majority Board members on February 18, 1992. The Board's Findings demonstrate that the Board acted under the premise that during the decade of the 1990's, some or all of Ohio's incumbent black legislators might retire, die or move on to other political posts. Board Finding No. 172, D. 147, Ex. A at 73. With that assumption as his guide, Tilling drew lines to "ensure" that a black incumbent's replacement (always assumed to be another black) would be elected. *Id.* at 71.[3] The Board set about implementing its strategy of drawing district lines on the basis of race on a county by county basis.

In Franklin County, Tilling "reconfigured House Districts 29 and 31 . . . to protect minority voters in those

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[3] The Board, in its Findings, attempted to justify its actions by relying on a regression analysis of the effect of incumbency in elections in Ohio minority districts for the years 1984, 1986, 1988 and 1990. Board Finding No. 173, D. 147, Ex. A at 73. Dr. King, Appellants' expert, found that for those years, black incumbents had an election advantage of 6-10% over non-incumbents. *Id.* To ensure that a new black candidate, running without the incumbency advantage, would be guaranteed election, Tilling drew race-based district lines calculated to provide new black candidates with election margins of not less than 68% and as high as 81%, averaging 77.6%. *Id.* at 75. Black incumbents themselves would be elected under Tilling's plan by margins of no less than 75% and as high as 89%, averaging 80%. *Id.* Tilling himself admitted that such electoral margins constitute "landslides." D. 312 at 313.

districts and to create a minority Senate District in Franklin County where none previously existed." Board Finding No. 189, D. 147, Ex. A at 86. The Board was motivated by the facts that (1) the incumbent black Franklin County legislators (Representatives Miller and Beatty) had indicated a desire to run for different offices; (2) it believed that the Voting Rights Act required the Board to protect classes of voters; and (3) it was concerned that Representatives Miller and Beatty would not serve out the decade. *Id.* at 86-87. Thus, Tilling reconfigured their districts to guarantee the future election of minority candidates, regardless of the plans of the two current incumbents. *Id.*

Board Finding No. 256, *id.* at 108, shows that Representative Miller's district, under the previous apportionment plan (with 1990 population), had 38.5% black population. Instead of honoring its obligation to maintain that district under § 7(D) of the Ohio Constitution, where Representative Miller had been elected for six terms with pluralities of better than two-to-one, the Board increased the black population of Representative Miller's new district to 44.68%, a 6.1% increase. Similarly, the black population of Representative Beatty's district was 48.6% in 1990, but the new race-based district created by Tilling increased Representative Beatty's black population to 54.3%, a 7.5% increase.[4]

In Lucas County, the Board "tried, as the Voting Rights Act makes clear, to draw the districts to protect a class of voters, not the particular incumbent in that situation. And that's why we basically added additional minority votes to that district, not because Casey Jones

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[4] The Board, on February 18, 1992, reduced the black population of Representative Miller's district from 55.92% to 54.3% and Representative Beatty's district from 48.29% to 44.68%. D. 349, Ex. 33 at 60-61. Tilling referred to those changes as "technical corrections", reiterating his view that the changes still would ensure that black voters of those districts would be able to elect a black candidate. *Id.* at 59-61.

[the black representative from Lucas County] needed them but because down the road in this decade whoever is his successor needs the opportunity to give minorities a clear chance to elect a candidate of their choice." Board Finding No. 177, D. 147, Ex. A at 77. Representative Jones' district in Lucas County, District 45, met the population requirements and, therefore, should have been retained, if possible, pursuant to Article XI, § 7(D) of the Ohio Constitution. Board Finding No. 52, *id.* at 16. Nevertheless, without even attempting to maintain Representative Jones' district, the Board included additional minority votes "not because [he] needed them" but, rather, because his successor might need them. Board Finding No. 177, *id.* at 77.

All four of the districts in Summit County met the population requirements of the Ohio Constitution, and should have been retained, if possible. Board Finding No. 52, *id.* at 16. The Board abdicated its responsibility to follow the Ohio Constitution by increasing the minority population of House District 42, represented by black legislator Vernon Sykes. The Board's sole justification for reconfiguring all four of the districts in Summit County was "that the district was losing black population and to avoid minority vote dilution." Board Finding No. 194, *id.* at 92.

In Montgomery County, the Board again adopted the vague criteria of "population shifts" and "avoidance of minority vote dilution" as justification for its race-based lines. Board Finding No. 193, *id.* at 90, states that "[i]n drafting the 1991 Apportionment Plan, Mr. Tilling also took into account the [black] population shifts in Montgomery County in reconfiguring districts in that county." Tilling stated that he reconfigured Representative McLin's district in order to avoid dilution of minority voting "especially in light of population trends throughout the decade." *Id.* at 91.

With respect to Hamilton County, the Board reiterated its determination to draw race-based lines:

> "Mr. Tilling, in drafting the 1991 Apportionment Plan, also determined that the Voting Rights Act protected classes of voters not incumbents. Since Representative Mallory is in his 60's, there is a particular need to reconfigure House District 23 to increase the relative percentage of black population in that district in order to provide an opportunity for a new black candidate, without benefit of incumbency, to be elected in that district."

Board Finding No. 183, *id.* at 82. Similarly, with respect to minority Representative Rankin in Hamilton County, the Board's original lines resulted in an increase in the black population of her district from 53.2% to 61%; that amount subsequently was reduced to 56%. Once again, the Board's rationale for the increased black population in Representative Rankin's district was that a new black candidate would require a district with increased black population to be successful. Board Findings Nos. 186-87, *id.* at 84.

Appellees commenced this action in the United States District Court for the Northern District of Ohio on November 1, 1991, challenging the apportionment plan adopted as Amendment C by the Board on October 1, 1991. D. 1. In their complaint, Appellees alleged that Amendment C violated § 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution. The District Court agreed that Amendment C violated § 2 of the Voting Rights Act and, on January 31, 1992, directed the Board either to show justification for its use of race in drawing districts or to submit a revised plan within twenty days. *Quilter v. Voinovich*, 794 F. Supp. 695, 701-02 (N.D. Ohio 1992).

In response to the District Court's directive, the majority Board members, on February 18, 1992, signed and submitted to the District Court their Findings of Fact and Conclusions of Law. D. 147, Ex. A. Immediately

following the adoption of their Findings, the majority members of the Board also adopted Amendment D, the plan at issue in this case. *Id.* at 107. Amendment D contained "technical corrections" to Amendment C, and reduced the number of majority-minority districts from eight to five. *Id.*; D. 147, Ex. C at 59. However, Amendment D perpetuated the race-based redistricting that always had been an integral part of Tilling's plan of apportionment.

On March 10, 1992, the District Court again ruled that Appellants' use of race in redistricting was not justified, and held that Amendment D violated § 2 of the Voting Rights Act and the Fifteenth Amendment. *Quilter v. Voinovich*, 794 F. Supp. 756, 757 (N.D. Ohio 1992). On appeal, this Court found that the evidence presented by Appellants failed to demonstrate "sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice." *Voinovich v. Quilter*, 113 S. Ct. 1149, 1158 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 49 (1986)). In that same opinion, this Court reversed the District Court's findings of violations of the Voting Rights Act and the Fifteenth Amendment, and remanded the case to the District Court for a determination of whether the plan's deviation from equal population among districts violated the Fourteenth Amendment. *Voinovich*, 113 S. Ct. at 1154.

Following remand, Appellees amended their complaint to challenge Appellants' admitted use of race in their plan as a conscious attempt to segregate voters by race in violation of the Fourteenth Amendment, as recognized by this Court in *Shaw v. Reno*, 113 S. Ct. 2816 (1993). Following a trial on November 16-17, 1994, the District Court again held, on April 28, 1995, that race was "a substantial and motivating factor" in the creation of at least House Districts 21, 22, 30, 31, 38, 39, 44 and 49, *Quilter v. Voinovich*, No. 5:91CV-2219 (N.D. Ohio Apr.

28, 1995), Appellants' App. (95-132) 34a, and directed Appellants to redraw those districts. *Id.* at 39a.

The District Court did not enter judgment in conjunction with its April 28, 1995 decision; that decision was not a final, appealable order because a remedy had not been selected by the District Court. Accordingly, on May 9, 1995, the District Court issued an order stating that *"preparatory to filing a Rule 54 Judgment Entry,* the parties are invited to submit by May 31, 1995 proposed remedies for the purpose of implementing the decision." *Quilter v. Voinovich,* No. 5:91CV-2219 (N.D. Ohio May 9, 1995), Appellants' App. (95-132) 81a (emphasis added). Despite the fact that the District Court stated expressly on May 9, 1995 that it had not entered judgment and had not selected a remedy in this matter, Appellants filed a notice of appeal on May 26, 1995. D. 329.

Also on May 26, 1995, the District Court vacated its April 28, 1995 Opinion (D. 325, Appellants' App. (95-132) 153a) and issued an amended opinion that disposed of Appellants' erroneous (and disingenuous) argument that the Board had not drawn district lines on the basis of race but, rather, had followed the mandates of the Ohio Constitution. Appellants' App. (95-132) 82a at 123a-126a and n.19.[5] Once again, a judgment entry was not filed; nevertheless, Appellants filed a second notice of appeal (D. 335) and prematurely filed a Jurisdictional Statement on July 24, 1995. The District Court subsequently vacated its May 26, 1995 Opinion (D. 341), issued a new Opinion framing its analysis of the facts

[5] Specifically, the District Court concluded that "even if we did conclude that compliance with the traditional districting principles in Article XI [of the Ohio Constitution] could constitute a compelling state interest justifying racial gerrymandering, the [Appellants] would still lose because the evidence reveals that the Apportionment Board did not comply with section 7(D) of Article XI." *Id.* at 124a.

in terms of the standard articulated by this Court in *Miller v. Johnson*, 115 S. Ct. 2475 (1995) (D. 342) and entered judgment in favor of Appellees and against Appellants on August 11, 1995. D. 344.

I. APPELLANTS' APPEAL DOES NOT PRESENT SUBSTANTIAL QUESTIONS

Substantial questions of law deserving of this Court's attention are omitted from Appellants' appeal. Since the last decennial census, this Court has addressed substantial issues relating to the use of race in the creation of voting districts; through those cases,[6] this Court has provided apportioning bodies with significant guidance in drawing district lines. By contrast, this Court's resolution of the questions presented by Appellants' appeal, which largely are procedural, will add little or nothing to the jurisprudence in this area.

Having made numerous admissions that many districts were drawn predominantly on the basis of race, Appellants understandably are alarmed by this Court's recent pronouncements, and are attempting to avoid the impact of those precedents by raising procedural barriers to the District Court's consideration of the merits of their plan. Appellants' appeal of these procedural issues trivializes the role of this Court.

This Court "is not, and never has been, primarily concerned with the correction of errors in lower court decisions." Vinson, C.J., Address to the American Bar Ass'n, Sept. 7, 1949, 69 S. Ct. v., vi. Rather, "[t]he Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions, and other important questions of law for the public benefit."

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[6] *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993); *Shaw v. Reno*, 113 S. Ct. 2816 (1993); *Miller v. Johnson*, 115 S. Ct. 2475 (1995); *United States v. Hays*, 115 S. Ct. 2431 (1995).

Taft, C.J., Hearings Before the House Committee on the Judiciary, 67th Cong., 2d Sess., ser. 33, at 2 (1922). The questions presented by Appellants' Jurisdictional Statement do not meet the criteria for review by this Court.

Procedural questions such as the District Court's discretion to allow amendment of Appellees' complaint after remand, Appellees' standing to challenge a redistricting plan that admittedly was drawn on the basis of race, or the question of whether Appellants' premature notice of appeal divested the District Court of jurisdiction to amend its Opinion present issues that are limited to the unique facts of this case. Similarly, the question of whether the District Court, based on the particular facts presented to it at trial, properly found that Appellants had given less weight to traditional districting principles than to racial considerations does not present this Court with the opportunity to decide an issue of significant precedential value. Since this Court's resolution of the procedural and factual issues presented by Appellants' appeal will not settle substantial questions of great or lasting legal significance, consideration of those issues trivializes the role of this Court.

II. THE DISTRICT COURT HAD JURISDICTION TO ENTER ITS ORDERS OF AUGUST 11, 1995

Supreme Court Rule 18.1 provides that "[a] direct appeal from a decision of a United States district court, when authorized by law, is commenced by filing a notice of appeal with the clerk of the district court within 30 days after *the entry of the judgment sought to be reviewed.*" (Emphasis added). Although Appellants filed two notices of appeal (on May 26 and June 23, 1995) prior to the Opinion filed by the District Court on August 11, 1995 (Appellants' App. at 3a), since no judgment had been entered by the District Court, those notices of appeal were premature. A district court is not divested of jurisdiction by a faulty or premature appeal.

"A baseless notice of appeal does not divest the district court of its jurisdiction." *McMath v. City of Gary*, 976 F.2d 1026, 1031 (7th Cir. 1992). "[A] notice of appeal from a plainly nonappealable order may properly be ignored by the district court." *Cochran v. Birkel*, 651 F.2d 1219, 1222 (6th Cir. 1981), *cert. denied*, 454 U.S. 1152 (1982). This is the rule because allowing an improper notice of appeal to divest a district court of jurisdiction would "leave[] the court powerless to prevent intentional dilatory tactics, foreclose[] without remedy the nonappealing party's right to continuing trial court jurisdiction, and inhibit[] the smooth and efficient functioning of the judicial process." *United States v. Hitchmon*, 602 F.2d 689, 694 (5th Cir. 1979).[7]

Appellants attempt to justify their filing of two premature notices of appeal through irrelevant references to 28 U.S.C. § 1292(a). Jurisdictional Statement, pp. 13-14. However, Appellants concede that the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1253, not § 1292(a). *Id.* at 3. "This Court has more than once stated that its jurisdiction under the Three-Judge Court Act [§ 1253] is to be narrowly construed since 'any loose construction of the requirements of [the Act] would defeat the purposes of Congress . . . to keep within narrow confines our appellate docket.'" *Goldstein v. Cox*, 396 U.S. 471, 478 (1970) (quoting *Phillips v. United States*, 312 U.S. 246, 250 (1941)). Supreme Court Rule 18.1 authorizes a direct appeal only after an entry of judgment;

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[7] The United States Court of Appeals for the Ninth Circuit has reached a similar conclusion. In *Legalization Assistance Project v. INS*, 976 F.2d 1198, 1203 n.5 (9th Cir. 1992), *vacated on other grounds*, 114 S. Ct. 594 (1993), the INS asserted that the district court did not have the authority to issue an order because a notice of appeal had been filed. The Ninth Circuit, however, held that "district courts have authority to revise an order or other form of decision *at any time before the entry of judgment adjudicating all claims, rights and liabilities of the parties.*" *Id.* (emphasis added).

that the District Court neither entered nor intended to enter judgment prior to August 11, 1995, is evidenced by the District Court's Order of May 9, 1995 (D. 324) stating that "preparatory to filing a Rule 54 Judgment Entry, the parties are invited to submit by May 31, 1995 proposed remedies." Appellants' App. (95-132) 81a.[8] Since the only appealable order was the District Court's August 11, 1995 Opinion, which was accompanied by a judgment entry directing Appellants to take remedial action to correct their unconstitutional plan, Appellants' prior notices of appeal were of no force or effect.

III. THE DISTRICT COURT PROPERLY APPLIED THIS COURT'S DECISION IN *MILLER v. JOHNSON*

The District Court clearly and unequivocally found that:

> "Based on our thorough review and consideration of all the evidence presented in this case, we find that race was the predominant motivating factor in the [Appellants'] creation of House districts 21, 22, 30, 31, 38, 39, 44, and 49 in the 1992 plan because traditional districting principles were subordinated to or given less weight in the reapportionment process than racial considerations. These House districts are the result of racial gerrymandering. Although none of these districts presents a bizarre shape, both direct evidence from trial testimony and the Apportionment Board's Findings and Conclusions and circumstantial evidence from Tilling's notes and accompanying maps, clearly reveal that the [Appellants] intention-

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[8] Appellants make the illogical argument that "this Court's jurisdiction was invoked when Appellants filed their notice of appeal from the district court's May 26, 1995, opinion." Jurisdictional Statement, p. 12. Appellants offer no explanation as to why, under their theory, this Court's jurisdiction was not invoked when Appellants filed their notice of appeal from the District Court's April 28, 1995 Opinion. Since the District Court's May 26, 1995 Opinion, like its April 28, 1995 Opinion, was not a final judgment, this Court's jurisdiction was not invoked by Appellants' improper notices of appeal.

> ally crafted these eight districts with the predominant purpose of separating voters on the basis of race."

Appellants' App. 3a at 36a-37a. Despite this finding, Appellants argue that the "district court majority did not find that Appellants 'relied on race in substantial disregard of customary and traditional districting principles.' " Jurisdictional Statement, p. 18 (quoting *Miller v. Johnson*, 115 S. Ct. 2475, 2497 (1995) (O'Conner, J., concurring)). Appellants' argument ignores the express language of the District Court's opinion, and is not worthy of serious consideration by this Court.

Appellants' attempts to defend their admitted use of race in drawing district lines has drawn them to increasingly untenable positions. For example, Appellants mislead this Court by asserting that "[s]ince the adoption of Amendment D, no court has ever found that any district in Amendment D violated any provision of the Ohio Constitution, or any traditional districting principle." Jurisdictional Statement, p. 19. In their next breath, Appellants admit that this statement is false by conceding that, in its May 26, 1995 Opinion, "*the district court majority had concluded that Appellants violated Article XI, § 7(D) of the Ohio Constitution* by not retaining more districts from the prior apportionment. App. (95-132) 124a-125a, n.19." *Id.* at n.16 (emphasis added).

Although the District Court, in its August 11, 1995 Opinion, abstained from deciding the issue of whether Appellants' plan violates the Ohio Constitution, Appellants' App. 3a at 35a-36a, Appellants' suggestion that the District Court did not find that Appellants relied on race in substantial disregard of traditional districting principles is meritless. In its August 11, 1995 Opinion, the District Court analyzed the facts of this case under the standard articulated by this Court in *Miller*, and concluded that *"racial considerations were the predominant factor in the [Appellants'] 1992 reapportionment plan."*

Appellants' App. 3a at 28a (emphasis added). By holding that Appellants were predominantly motivated by race, the District Court necessarily found that traditional districting principles were improperly subordinated to racial considerations by Appellants. Thus, under the facts presented to the District Court, Appellants' plan is unconstitutional under *Miller*.

IV. BASED ON THE OVERWHELMING EVIDENCE THAT APPELLANTS WERE MOTIVATED PRIMARILY BY RACE IN DRAWING DISTRICT LINES, THE DISTRICT COURT PROPERLY CONCLUDED THAT APPELLANTS GAVE LESS WEIGHT TO TRADITIONAL DISTRICTING PRINCIPLES THAN TO RACIAL CONSIDERATIONS

Despite the overwhelming evidence—from the testimony of Appellants' witnesses, Tilling's statements at public meetings, the Board's Findings, Tilling's notes, and elsewhere—that the Board's main consideration in drawing district lines was the creation of majority-minority districts in order to comply with the federal Voting Rights Act, Appellants ask this Court to reverse the District Court's factual determination that traditional districting principles were given less consideration than racial factors in Appellants' apportionment plan. Jurisdictional Statement, p. 20. Appellants' suggestion that the District Court did not have substantial evidence from which it could find that race was the predominant factor motivating the Board's actions is specious.

Appellants attempt to dismiss the extensive admissions of race-based districting contained in Tilling's handwritten notes, and in the Board's Findings, as the "only two items" of evidence that the District Court could cite to establish racial gerrymandering. *Id.* Those "two items" constitute more than enough direct evidence for the District Court to conclude that Appellants consciously separated voters by race.

Appellants argue that Tilling's handwritten notes are irrelevant because they relate to Amendment C. *Id.* at 21. Appellants do not inform the Court that the unconstitutional line drawing in the challenged plan (Amendment D) was derived from Amendment C, and that Tilling's race-based lines in Amendment C were not abandoned or replaced by the adoption of Amendment D. Similarly, Appellants' argument that the reduction of the number of majority-minority districts from nine in Amendment C to five in Amendment D somehow establishes that race was not the predominant motivating factor in Amendment D, *id.*, establishes only that Tilling continued to be preoccupied by racial considerations as he amended his plan.

Appellants also argue that the Board's Findings are irrelevant because they "merely constitute a *post hoc* rationalization for the plan eventually adopted." *Id.* at 22. What Appellants euphemistically call a "*post hoc* rationalization" is a signed document that spells out the numerous ways in which Appellants based their plan on the race of voters and candidates in order to ensure that black candidates would be elected or re-elected by black voters. The fact that the Board did not admit in writing that it was primarily motivated by race until directed by the District Court to justify its inclusion of majority-minority districts in Amendment C does not render erroneous the District Court's conclusion that Appellants gave greater weight to racial considerations than to traditional districting principles in its apportionment plan.

CONCLUSION

For all of the foregoing reasons, Appellants' appeal should be dismissed and the August 11, 1995 Opinion of the District Court should be affirmed.

Respectfully submitted,

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Nos. 95-132, 95-378

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IN THE
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OCTOBER TERM, 1995

GEORGE V. VOINOVICH,
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Appellants,

v.

BARNEY QUILTER, *et al.*,
Appellees.

Appeals from the United States District Court for the Northern District of Ohio

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BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR TO AFFIRM

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BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR TO AFFIRM

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. INTRODUCTION.

Appellants hereby submit this response to the Motions to Dismiss filed by Appellees both in case number 95-132 and in case number 95-378. There is a good deal of overlap between the issues in these cases, and consequently, Appellants submit a single response to the Motions to Dismiss in both cases.[1]

In their Motions to Dismiss, Appellees have failed to present the Court with any persuasive arguments that this appeal should either be dismissed or that this Court should affirm the rulings of the district court. Indeed,

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[1] For the Court's convenience, Appellants have listed the Questions Presented in both cases in the Appendix hereto.

Appellees' Motions to Dismiss further demonstrate that this Court should either summarily reverse the decisions of the district court or note probable jurisdiction and set the case for argument.[2]

The district court majority, in search of a rationale for its seemingly never-ending effort to invalidate Ohio's plan of apportionment for its General Assembly, has complicated this case by injecting a number of procedural and jurisdictional issues. The district court majority exceeded the scope of this Court's remand in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993), and otherwise abused its discretion by permitting Appellees to amend their complaint following remand and to retry this case on a theory completely at odds with the theory upon which they originally tried the case. Then, the district court majority twice vacated its opinion and issued a new one.[3] On each occasion, the district court majority's actions required the participation of a judge who had resigned from office effective three days after the issuance of the April 28, 1995, opinion. Furthermore, the district court was without jurisdiction to vacate its May 26, 1995, decision because a proper appeal from that decision was pending in this Court.[4]

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[2] Much of Appellees' argument seems to suggest that this case is before the Court on a petition for a writ of certiorari. See Motion to Dismiss (95-132) at 7-8; Motion to Dismiss (95-378) at 12-13. It hardly needs emphasis, but in view of the tone of many of Appellees' assertions, Appellants note that this case is before the Court on appeal pursuant to 28 U.S.C. § 1253. Indeed, this is the only appeal available on a matter of great importance both to the people of the State of Ohio and to the proper relationship between federal and state authority.

[3] On May 26, 1995, the district court majority vacated its April 28, 1995, opinion and issued a new opinion. On August 11, 1995, the district court majority vacated its May 26, 1995, opinion and issued yet another opinion.

[4] Appellees suggest that Appellants inconsistently fail to assert that their notice of appeal from the district court's decision of April 28, 1995, deprived that court of jurisdiction to vacate that opinion and issue a new opinion on May 26, 1995. Motion to

Stripped of procedural and jurisdictional complexities, what is clear from its actions on remand from this Court is that the district court majority was searching for a reason, *any reason*, to usurp the authority of the Ohio Apportionment Board to draw districts for the Ohio General Assembly. The evidence before the district court unequivocally established that race was not the predominant factor motivating Appellants' adoption of the districts contained in Amendment D. Appellees simply could not establish that Appellants disregarded traditional districting principles or even that Appellants "gave race more weight than" other factors when drawing the plan. Thus, under any interpretation of this Court's decision in *Miller v. Johnson*, 115 S.Ct. 2475 (1995), including the district court majority's erroneous interpretation of August 11, 1995, judgment should be entered for Appellants.

II. THIS COURT HAS JURISDICTION OVER APPELLANT'S APPEAL IN 95-132, AND THE DISTRICT COURT WAS WITHOUT JURISDICTION, THEREFORE, TO ENTER ITS ORDERS OF AUGUST 11, 1995.

Appellees have suggested that this Court lacks jurisdiction over Appellants' appeal in case number 95-132 because no judgment was entered in this case until August 11, 1995. This argument is without merit.

28 U.S.C. § 1253 provides:

> Except as provided by law, any party may appeal to the Supreme Court from *an order granting or denying*, after notice and hearing, *an interlocutory or permanent injunction* in any civil action, suit or

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Dismiss (95-378) at 15 n.8. Appellants have previously advised this Court, however, that the district court majority's May 26, 1995, decision and its order vacating its April 28, 1995, decision were filed some five hours *prior* to Appellants' notice of appeal, also filed on May 26, 1995. Jurisdictional Statement (95-378) at 7. Accordingly, no appeal was pending at the time the district court vacated its April 28, 1995, decision.

> proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

(emphasis added). The district court's decisions of April 28, 1995, and May 26, 1995, directed Appellants to redraw eight Ohio House districts. App. (95-132) 39a ("Accordingly, we direct the State Defendants to redraft House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan to comply with the aforementioned principles."); App. (95-132) 127a (same). Both decisions, therefore, constitute injunctions which were immediately appealable to this Court. *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 306-09 (1975) (three-judge district court order that "directs" a party to take certain action is an injunction, and is, therefore, appealable to this Court pursuant to 28 U.S.C. § 1253). See also *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194-95 (1972); *White v. Regester*, 412 U.S. 755, 759-60 (1973). Accordingly, Appellees' assertion that Appellants' appeals from the April 28, 1995, and May 26, 1995, orders were premature is completely without merit.

Because Appellants properly invoked the appellate jurisdiction of this Court pursuant to 28 U.S.C. § 1253, the district court lacked jurisdiction to alter the status of this case before this Court, *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985), as the district court purported to do in its orders of August 11, 1995.

III. THE DISTRICT COURT ERRED BY DECLARING FOUR DISTRICTS INVALID BECAUSE THE PLAINTIFFS FAILED TO ESTABLISH THAT ANY OF THEM SUFFERED A COGNIZABLE INJURY UNDER THE FOURTEENTH AMENDMENT WITH REGARD TO THOSE FOUR DISTRICTS.

In their Motion to Dismiss or Affirm in case number 95-132, Appellees assert that, although none of them reside in four of the eight house districts declared invalid by the district court majority, they nevertheless have standing to challenge every district contained in Amendment D. In *United States v. Hays*, 115 S.Ct. 2431 (1995), however, this Court held that nonresidents of allegedly racially gerrymandered districts do not have standing under the Fourteenth Amendment to challenge the validity of those districts. 115 S.Ct. at 2436. This Court further ruled that residents of districts adjoining those alleged to have been racially gerrymandered do not have standing to attack an apportionment plan simply by alleging that the racial composition of the district in which they reside would have been different if the adjoining district had not been so gerrymandered. Nonresidents of allegedly racially gerrymandered districts simply have not suffered "a cognizable injury under the Fourteenth Amendment." 115 S.Ct. at 2437.

Despite this Court's clear holding in *Hays*, Appellees assert that because some of them reside in four of the eight districts, they have standing to challenge the entire plan. This assertion is without any support in this Court's decision in *Hays*. Under Appellees' view of *Hays*, a plaintiff challenging the Hamilton County (Cincinnati) house district in which he resides would also have standing to challenge a Cuyahoga County (Cleveland) house district, even though that district is located at the opposite end of the state, more than 240 miles away. *Hays*, in which this Court denied standing to residents of adjoining districts, cannot be interpreted as suggested by Appellees.

Appellees, analogizing Apportionment Board members to legislators, further assert that they have standing to challenge the entire plan of apportionment because two of the Plaintiffs, Ferguson and Quilter, were the minority members of the Board which adopted the plan. This assertion is nonsensical.

This Court has concluded that legislators "whose votes . . . have been overridden and virtually held for naught . . ." may have standing to challenge official acts which have the effect of nullifying their votes. *Coleman v. Miller*, 307 U.S. 433, 438 (1939). See also *Kennedy v. Sampson*, 511 F.2d 430, 436 (D.C. Cir. 1974) (A legislator alleging "an illegal nullification" of his vote has standing "to vindicate the effectiveness of his vote."). But neither this Court, nor any federal court, has ever held that a legislator in the minority has standing *as a legislator* to challenge legislative action by the majority. See *Leopold v. O'Leary*, 80 F.R.D. 99, 101 (D.Haw. 1978) ("A legislator has no special right to standing simply by virtue of that status.").

In the case at bar, Ferguson and Quilter allege no concrete injury as a result of the Apportionment Board's adoption of Amendment D. They do not reside in any of the challenged districts, and indeed, they no longer hold political office. Ferguson and Quilter's only asserted injury is that when Amendment D was adopted, they voted no.[5] Certainly, the mere casting of a dissenting vote is insufficient to confer standing upon a quasi-legislative official to challenge the action of the majority. *Korioth v. Brisco*, 523 F.2d 1271, 1278 (5th Cir. 1975) ("None of the cases has indicated that a legislator, simply by virtue of that status, has some special right to invoke judicial consideration of the validity of a statute passed over his objecting vote.") (footnote omitted). Conse-

[5] Under Appellees' view of standing, every bill passed by a federal state, or local legislative body would be subject to challenge by any legislator over whose dissenting vote the bill was passed.

quently, Appellees lacked standing to challenge four of the eight districts declared invalid by the district court majority.[6]

IV. THE DISTRICT COURT ERRED BY MISAPPLYING THIS COURT'S DECISION IN *MILLER v. JOHNSON*, AND BY CONCLUDING THAT RACE WAS THE PREDOMINANT MOTIVATING FACTOR IN THE DRAFTING OF DISTRICTS CONTAINED IN AMENDMENT D.

In their Motions to Dismiss or Affirm, Appellees urge this Court to affirm the district court majority's erroneous interpretation and application of this Court's decision in *Miller v. Johnson, supra.* Appellants submit that this Court's decision in *Miller* is clear and unambiguous; strict scrutiny is not required unless the plaintiffs establish that race was "the predominant factor motivating" the drawing of district lines. *Miller*, 115 S.Ct. at 2488. Plaintiffs cannot make this showing unless they prove that traditional districting principles were "subordinated . . . to racial considerations," 115 S.Ct. at 2488, *i.e.*, that state officials "relied on race in substantial disregard of customary and traditional districting practices." 115 at 2497 (O'Connor, J., concurring). In essence, Appellees invite this Court to reject its unambiguous holding in *Miller* and adopt a new standard.

Even if this Court were to accept Appellees' invitation and adopt the district court majority's new "more weight than" standard, it must conclude that on the evidence presented, the district court erroneously determined that race "was given more weight than" traditional districting

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[6] Appellees also asserted that Ferguson and Quilter have "*jus tertii* standing" to assert the rights of third parties who reside in the eight districts declared invalid by the district court. Ferguson and Quilter have not, however, suffered their own injury-in-fact and have no legal realtionship with those individuals whose rights they are purporting to assert. Accordingly, "*jus tertii* standing" is inapplicable. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

principles. Indeed, the very evidence cited by the district court unequivocally establishes that the Board did not give race more weight than other factors when it adopted Amendment D.

Tilling's handwritten notes confirm that race was *not* "the predominant motivating factor" in drawing the districts contained in *Amendment D*. As Tilling explained at trial, he created his "model" plan to determine how many majority-minority districts could be created so that he could use that plan as a benchmark to judge all plans submitted to the Board. D. 312 at 335. Under his "model" plan, Tilling created nine majority-minority districts, but Amendment D contains only five such districts. Furthermore, when Amendment D was adopted reducing the number of majority-minority districts to five, Tilling explained that the sole (and uncontradicted) reason for doing so was to comply with the provisions of Article XI of the Ohio Constitution.[7] Thus, the requirements of the Ohio Constitution were "given more weight than" race in drafting Amendment D.

Similarly, the Board's Findings and Conclusions establish that race was not given more weight than other factors in drafting a reapportionment plan for the Ohio General Assembly, but rather that race was considered as *a* factor.[8] When considered as a whole, they establish the

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[7] As explained by Tilling:

> That is only a result of recombining political subdivisions, and there's no other motivation whatsoever. But it points out, and I think you want to examine these numbers in real detail. It does illustrate what happens when you follow the Ohio Constitution, not the Voting Rights Act.

D. 147, Ex. B at 87.

[8] Contrary to Appellees' assertion, the Board's Findings and Conclusions were not adopted pursuant to the district court majority's command to "show justification for its use of race in drawing districts . . . ." Motion to Dismiss (95-132) at 4-5; Motion to Dismiss (95-378) at 9. Rather, the Board's Findings and Conclu-

Board's belief that its plan complied with *both* the traditional districting principles embodied in Article XI of the Ohio Constitution and the requirements of federal law. D. 147, Ex. A, Findings at ¶¶ 32, 34, 241-54, Conclusions at ¶¶ 7-8, 11-12. See *Voinovich*, 113 S.Ct. at 1158.[9] Thus, it is plain that race was *not* the predominant factor in the Board's reapportionment, and contrary to the district court's holding, race was not given more weight than traditional districting principles.[10] This Court

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sions were adopted following the district court majority's command *to show justification for the creation of majority-minority districts rather than a greater number of influence districts as demanded by Appellees. Quilter v. Voinovich*, 794 F.Supp. 695, 701-02 (N.D.Ohio Jan. 31, 1992). It is for this reason that the Findings and Conclusions go into great detail explaining the drawing of district lines in all urban counties and the effect of those lines on concentrations of minority population. It is completely disingenuous for Appellees to assert that this detailed explanation, which they demanded, establishes that race was given more weight than traditional districting principles.

When viewed in their entirety, however, the Board's Findings and Conclusions establish that race was simply one of many factors considered by the Board. This is apparently the reason the district court majority originally adopted its "substantial and motivating factor" standard in its unrelenting quest to invalidate Ohio's reapportionment plan.

[9] Even the district court acknowledged that "[t]he Apportionment Board instructed Tilling to 'draw a plan that was in comportment with the Ohio Constitution, the Fourteenth and Fifteenth Amendments of the United States Constitution and the Voting Rights Act,' and Tilling attempted to comply. Tilling considered race to avoid dilution of minority voting strength in violation of the Voting Rights Act." App. (95-132) 28a (citations omitted); App. (95-132) 111a (citations omitted); App. (95-378) 29a.

[10] The district court majority also cites as evidence of racial gerrymandering the following increases in black voting age population in districts then represented by incumbent African-American legislators: (1) HD 21, +7.50%; (2) HD 22, +6.18%; (3) HD 30, +2.78%; (4) HD 31, +3.26%; (5) HD 38, +2.30%; (6) HD 39, +4.59%; (7) HD 44, +7.67%; and (8) HD 49, +8.29%. App. (95-378) 31a-35a. Appellants maintain that these minor increases in African-American voting age population do not support a finding

should, therefore, note probable jurisdiction and reverse the decision of the district court.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Appellants' Jurisdictional Statements in case numbers 95-132 and 95-378, filed on July 24, 1995, and September 8, 1995, respectively, this Court should either:

(a) summarily reverse the judgment below and remand for entry of judgment in Appellants' favor in accordance with the Court's opinion and mandate in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993); or

(b) note probable jurisdiction and reverse the decision of the district court.

Respectfully submitted,

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that race was "the predominant motivating factor" in drawing the districts contained in Amendment D.

APPENDIX

APPENDIX

QUESTIONS PRESENTED

95-132:

1. Did the court below violate the terms of this Court's remand, or commit an abuse of discretion, when, following the remand, it granted plaintiffs' motion for leave to file an amended complaint and proceeded to adjudicate the new claim presented in that complaint?

2. Did the district court err in allowing this action to be maintained with respect to those electoral districts in which no plaintiff suffered any cognizable injury?

3. Was the district court's judgment erroneous (a) because it applied an incorrect standard of proof in determining that plaintiffs had made out a *prima facie* case and (b) because plaintiffs could not make out a *prima facie* case under the correct standard of proof?

4. If the district court did not err in holding that plaintiffs had made out a *prima facie* case requiring strict scrutiny of defendants' actions, did the court err in concluding that the defendants had failed to establish a compelling interest justifying those actions?

5. Did the district court err in considering the question whether defendants' actions violated the Ohio Constitution because (a) consideration of that question was barred by the full faith and credit statute, 28 U.S.C. § 1738, and (b) if consideration was not barred by that statute, the district court should have abstained under the principles laid down by this Court?

95-378:

1. Did the court below violate the terms of this Court's remand, or commit an abuse of discretion, when, following the remand, it granted plaintiffs' motion for leave to

file an amended complaint and proceeded to adjudicate the new claim presented in that complaint?

2. Was the district court divested of jurisdiction in this case once a proper notice of appeal was filed and perfected by the filing of a jurisdictional statement with this Court?

3. Did the district court err in allowing this action to be maintained with respect to those electoral districts in which no plaintiff suffered any cognizable injury?

4. Did the district court err by (a) ruling that a plaintiff may establish a *prima facie* case of racial gerrymandering without establishing that the state redistricting officials relied on race in substantial disregard of customary and traditional districting principles, and if not, (b) by ruling that, on the evidence before it, the defendants had given less weight to traditional districting principles than to racial considerations?

5. If the district court did not err in holding that plaintiffs had made out a *prima facie* case requiring strict scrutiny of defendants' actions, did the court err in concluding that the defendants had failed to establish a compelling interest justifying those actions?